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Supreme Court of the United States

OCTOBER TERM, 1949

No. 61

JOHN HUGHES AND LOUIS RICHARDSON,
PETITIONERS,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1949.
CERTIORARI GRANTED MAY 2, 1949.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA

No. 39861

LUCKY STORES, INCORPORATED, a Corporation, Plaintiff

vs.

PROGRESSIVE CITIZENS OF AMERICA, an Unincorporated Association; Progressive Citizens of America Canal Club, an Unincorporated Association; Progressive Citizens of America Canal Precinct Club, Richmond Chapter, an Unincorporated Association; Mrs. E. Williams, Individually and in Her Representative Capacity; Mrs. F. Anderson, Individually and in Her Representative Capacty; Glen Mapps, Individually and in His Representative Capacity; John Hughes, Individually and in His Representative Capacity; The National Association for the Advancement of Colored People, an Unincorporated Association; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eight Doe, Ninth Doe, Tenth Doe, Eleventh Doe, Twelfth Doe, Thirteenth Doe, Fourteenth Doe, Fifteenth Doe, Sixteenth Doe, Seventeenth Doe, Eighteenth Doe, Nineteenth Doe, Twentieth Doe, Twenty-First Doe, Twenty-Second Doe, Twenty-Third Doe, Twenty-Fourth Doe and Twenty-Fifth Doe, Defendants.

COMPLAINT FOR INJUNCTION—Filed May 20, 1947

Now come Lucky Stores Incorporated, a corporation and [fol. 4] for cause of action against the defendants and each of them alleges:

I

Plaintiff Lucky Stores Incorporated is a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at the City of Oakland, County of Alameda, State of California, and doing business in the Counties of Alameda and Contra Costa.

II

Plaintiff is ignorant of the true names of defendants First Doe to Twenty-Fifth Doe, inclusive, and, therefore, sues them by such fictitious names. Plaintiff prays leave that their true names, when ascertained, may be inserted in all papers, files and pleadings in this proceeding.

III

That the defendant, Progressive Citizens of America, an unincorporated association, hereinafter referred to as The Association, is now, and at all times herein mentioned has been an unincorporated association, subdivided into various territorial local groups throughout the United States and composed of more than two persons who are residing in and associating in business and contracting business under said name in the County of Contra Costa, State of California.

That the defendant Progressive Citizens of America Canal Club and Canal Precinct Club, Richmond Chapter, Progressive Citizens of America are unincorporated associa- [fol. 5] tions consisting of more than two persons who are residing in and associating in business and transacting business in the County of Contra Costa, State of California, under the common name.

That the defendant, Mrs. E. Williams, is an individual doing business in the County of Contra Costa, and is an officer of the Association, to wit, the Canal Club President, and is made a party hereto in her individual and representative capacity.

That the defendant, Mrs. F. Anderson, is an individual doing business in the County of Contra Costa, and is an officer of the Association, to wit, Club Secretary of the Canal Club, and is made a party hereto in her individual and representative capacity.

That the defendant, Glen Mapps, is an individual doing business in the County of Contra Costa and is an officer, to wit, Committee Chairman of the Canal Club of the Association, and is made a party hereto in his individual and representative capacity.

IV

That there exists between the Retail Clerks Union, Local No. 1179, a collective bargaining contract entered into

September 19, 1946, and continuing in full force and effect until September 19, 1947; that a true copy of said contract is incorporated herein by reference and made a part of this complaint as if set forth in full, and is attached hereto as Exhibit "A".

That within said Collective Bargaining Contract there are provisions:

Section I. Recognition of the Union

The Employer hereby recognizes the Union as the sole [fol. 6] collective bargaining agency for all employees working for the Employer and within the jurisdiction of the Union and the Union recognizes the employer Association as bargaining agent for its members who have given it proper power of attorney and duplicate, original of which is deposited with the Union at the time of signing this agreement.

Section II. Employment of Union Members

The employer shall employ only members of the Union in good standing and through the office of the Union; provided, however, that in the event the said Union cannot meet the request of the Employer for an employee, as hereinafter set forth, the Employer may hire a person not affiliated with the Union.

The Union shall maintain a list of unemployed members together with their qualifications. In the event said list contains no members satisfactory to the Employer, he may hire a non-member of the Union, but only in compliance with the following rules:

(a) The Employer shall notify the Union prior to the employment of such non-Union person.

(b) The said employee shall file an application to become a member of the Union before reporting for work. The Union shall not initiate said employee within twenty-one (21) days from the date of his employment unless approved by the Employer.

(c) The Employer shall, upon notice from the Union, immediately discontinue the employment of said person if said person has not filed said application and has not become a member of said Union as above set forth.

(d) The Employer shall pay said person so employed during the period said person is not a member of the Union at the regular Union wage provided for in this agreement for the class of work said person is doing, and shall in all other respects require said person to work under and live up to all Union rules and regulations covering the employment as set forth in this agreement.

It is further provided in said Collective Bargaining Contract: "The term of this agreement shall be one year from its effective date and may be renewed thereafter for like periods of time . . ."

[fol. 7] V

That defendants and each of them, and particularly defendants, Progressive Citizens of America Canal Club, through their duly authorized representatives, have demanded that in addition to the agreement reached on hours and wages that plaintiff further agree to hire negro clerks, such hiring to be based upon the proportion of white and negro customers patronizing plaintiffs' stores, and that the plaintiff discharge those employees participating in the apprehension and arrest of McKennly Jackson, accused of the theft of six pounds of bacon from one of plaintiff's store units located near the Canal Housing Project, Richmond, California. These demands plaintiff has refused.

The allegations that said demand upon plaintiff to hire negro clerks in proportion to white and negro customers patronizing plaintiff's stores is beyond the terms and provisions of the clause which treats of modification and renewal of the contract entered into between plaintiff and Retail Clerks Union, Local No. 1179, dated September 19, 1946, hereinabove referred to.

Plaintiff further alleges that there exists no dispute between plaintiff and Retail Clerks Union, Local No. 1179, as to hours, wages and conditions of employment in that an agreement has been reached between the parties in all such matters, and said agreement does not now expire until September 19, 1947. Plaintiff further alleges that the demand of the defendants, Progressive Citizens of America, Canal Club, for the hiring of negro retail clerks based upon a proportion of negro customers patronizing plaintiff's [fol. 8] stores is one that would contemplate other changes in the contract or the addition of other provisions into the con-

tract not covered by the modification and renewal clause of said contract.

VI

By reason of the refusal of plaintiff as above set forth in Paragraph V hereof, defendants, and each of them, and particularly defendant Progressive Citizens of America Canal Club, have picketed and do continue to picket plaintiff's store located at the Canal Project, Richmond, California, as a means of securing the demands made by said defendants upon plaintiff.

Plaintiff alleges this picketing to be in violation of the Collective Bargaining Agreement between plaintiff and the Retail Clerks Union, Local No. 1179, currently in full force and effect and made a part of this complaint as Exhibit "A".

Plaintiff alleges that defendant Parent Association is a party to and lending its support to the picketing by defendant Canal Club of the plaintiff in that it is acting in concert with said Canal Club and the other defendants to enforce the unreasonable and unjustifiable demands of defendants for the hiring of additional negro clerks in stores of the plaintiff, and for the discharge of those employees connected with the firing of a pistol and the subsequent arrest of Mr. McKennly Jackson.

VII

Unless defendants, and each of them, are restrained and enjoined from such action or any threatened action or of any other means which will force the closing of plaintiff's store [fol. 9] operations in the County of Contra Costa, plaintiff will suffer irreparable damage unless defendants' actions are restrained and enjoined in that: Plaintiff will be prevented from carrying on its normal operations in the retailing of food stuffs, and the continued picketing by defendants would lead to a closing of plaintiff's stores to the great damage of plaintiff.

VIII

Plaintiff alleges that the establishment of picket lines in front of plaintiff's stores in order to enforce the demand for hiring of additional negro clerks, such hiring to be based on the proportion of white and negro customers

patronizing plaintiff's stores, and in order to enforce its demand for the discharge of those employees of plaintiff who effected the arrest of Mr. McKinnly Jackson, a shop-lifter, is an infringement upon plaintiff's right to do business.

IX

Plaintiff alleges that there exists between organized labor and labor unions in the County of Contra Costa a common agreement and understanding that neither the unions, nor the members thereof, will pass through a picket line, whether the objects of that picket line are legal or illegal, proper or improper. Plaintiff alleges that the establishment of a picket line in front of its stores would have for its purpose the forcing of plaintiff to comply with defendants demand for the hiring of negro clerks based upon a proportion of white and negro customers patronizing plaintiff's stores, and the discharging by plaintiff of [fol. 10] those employees of plaintiff who aided in the arrest of McKinnly Jackson, a shop-lifter; that each and all of said purposes of said picket line would be contrary to the terms of the Collective Bargaining Contract presently in full force and effect between plaintiff and the Retail Clerks Union, Local No. 1179, Exhibit "A" heretofore referred to and made a part of this complaint.

X

Plaintiff alleges that it has no adequate remedy at law in this: There exists an inadequacy and uncertainty of damages that would be suffered by plaintiff if defendants actions continue, and plaintiff would suffer permanent loss of some of its customers to competitors.

Plaintiff alleges that the amounts of such damage are unforseeable and cannot be estimated.

XI

Plaintiff is informed and believes, and upon such information and belief alleges the following facts peculiarly within the knowledge of defendants Mrs. E. Williams, Mrs. F. Anderson, Glenn Mapps and John Hughes, individually and in their respective capacities, as well as other diverse persons whether or not named as defendants, Twenty-First Doe to Twenty-Fifth Doe, inclusive; that defendants Mrs. E. Williams, Mrs. F. Anderson, Glenn Mapps and John

Hughes, and such other diverse persons presently unknown to plaintiff, have conspired together in concert to get an unlawful action against plaintiff, to wit: To induce a breach [fol. 11] of the contract currently in existence and effect between plaintiff and Retail Clerks Union, Local No. 1179; that further in said conspiracy they have picketed plaintiff's store located in the Canal Housing Project, Richmond, and unless said unlawful actions of defendants, Mrs. E. Williams, Mrs. F. Anderson, Glenn Mapps and John Hughes, and such other diverse persons presently unknown are restrained, the means adopted by said defendants to carry out said conspiracy will work to the irreparable damage of plaintiff in the manner and means above set forth.

Wherefore, plaintiff prays,

1. That defendants and each of them be permanently enjoined and restrained from acting in concert one with the other to compel plaintiff to do any act, particularly:

(1) The selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores.

(2) The discharge of those employees participating in the apprehension and arrest of McKinnly Jackson, a shoplifter.

2. That defendants and each of them be permanently enjoined and restrained from any picketing or from any other means used, or to be used, by defendants in bringing economic pressure to bear upon plaintiff.

3. That this court make an order directing the defendants and each of them to show cause at a time and place appointed in such order of the Court why they and each of them should not be enjoined and restrained during the pendency of this action, from doing any of the actions [fol. 12] above mentioned.

4. That a temporary restraining order be granted plaintiff herein enjoining and restraining said defendants and each of them, their officers and agents and each of them until a hearing upon such order to show cause from doing or causing to be done any of the said acts or things herein complained of.

5. That upon the hearing of said order to show cause a permanent injunction be granted restraining said defendants and each of them from doing any of said acts and things during the pendency of said action as are complained of herein.

6. That plaintiff be allowed its costs of suit herein incurred and such other and further relief as may be just and proper.

Hoey & Hoey, Attorneys for Plaintiff.

Duly sworn to by Otto P. Meyer. Jurat omitted in printing.

[fol. 13] EXHIBIT TO COMPLAINT

Agreement

This Agreement, made and entered into this — day of ——, 19—, by and between ——, a —— (here insert whether corporation, partnership or individual), First party, hereinafter called Employer, and Retail Clerks' Union, Local No. 1179, affiliated with the American Federation of Labor through the Retail Clerks' International Protective Association, Second Party, hereinafter called Union.

Witnesseth:

In consideration of the premises and of the respective promises, agreements and covenants of the said parties hereto, they do hereby mutually agree as follows, to-wit:

Sec. I. Recognition of the Union

The employer hereby recognizes the Union as the sole collective bargaining agency for all employees working for the Employer and within the jurisdiction of the Union and the Union recognizes the Employer Association as bargaining agent for its members who have given it proper power of attorney and duplicate, original of which is deposited with the Union at the time of signing this agreement.

Sec. II. Employment of Union Members

The employer shall employ only members of the Union in good standing and through the office of the Union; provided, however, that in the event the said Union cannot

meet the request of the Employer for an employee, as hereinafter set forth, the Employer may hire a person not affiliated with the Union.

The Union shall maintain a list of unemployed members together with their qualifications. In the event said list contains no members satisfactory to the Employer, he may hire a non-member of the Union, but only in compliance with the following rules:

(a) The Employer shall notify the Union prior to the employment of such non-Union person.

(b) The said employee shall file an application to become a member of the Union before reporting for work. The Union shall not initiate said employee within twenty-one (21) days from the date of his employment unless approved by the Employer.

(c) The Employer shall, upon notice from the Union, [fol. 14] immediately discontinue the employment of said person if said person has not filed said application and has not become a member of said Union as above set forth.

(d) The Employer shall pay said person so employed during the period said person is not a member of the Union, at the regular Union wage provided for in this agreement for the class of work said person is doing and shall in all other respects require said person to work under and live up to all Union rules and regulations covering the employment as set forth in this agreement.

Sec. III. Discharge of and Discrimination Against Employees

The employer shall not discharge or discriminate against an employee for upholding Union principles, serving on a committee of the Union or any organization affiliated therewith, and failing or refusing to purchase stocks, bonds, securities or interest in any partnership, corporation and/or company.

Upon discharge of any employee the Employer shall, within twenty-four (24) hours thereafter notify the Union of such discharge, and the reason therefor.

Sec. IV. Working Hours and Overtime

(a) Eight (8) hours shall constitute a regular day's work and forty (40) hours consisting of five eight hour days

shall constitute a regular week's work. The said forty (40) hours consisting of said five eight hour days shall be worked as follows: Within seven (7) consecutive days, Sunday through Saturday inclusive, the said five eight hour days which constitute the regular week's work, shall be consecutive in a seven day store operation; but may be any five (5) days within the said seven (7) consecutive days (Sunday through Saturday inclusive), where the operation is a six day or less store operation.

(1) Anything contained in this contract to the contrary, nothing in this contract shall be construed to prohibit the designation by the Employer of any two (2) consecutive days off as the employee's day off immediately following an employee's five (5) consecutive days of work, nor any five (5) consecutive days of work immediately following an employee's two (2) consecutive days off, but in any event the five (5) consecutive days' work and the two (2) consecutive days off must be within a period of seven (7) consecutive days.

(a-2) There shall not be more than two (2) consecutive days off between the last day worked in any one seven (7) day period and the first day worked in the following seven (7) day period. It being agreed in this respect that an extra [fol. 15] day or day's work as may be required shall be given the employee to eliminate more than two (2) consecutive days off, such extra day or days worked shall be at the overtime rate.

All work performed in excess of the regular day's work of eight (8) hours in any one day, or in excess or outside of the regular forty (40) hours work in any one week, shall be deemed overtime and paid at the overtime rate of one and one-half times the regular straight time rate.

(b) Including the lunch period, the hours comprising the day's work for all employees shall be worked consecutively. Both male and female employees shall receive one continuous and uninterrupted hour off for lunch at approximately the middle of the working day. No employees shall be required or allowed to perform any duties of his employment during his lunch period.

(c) All employees working less than five (5) full consecutive days in any calendar week shall be paid ten cents per hour above the scale in the classification in which they

work, and shall be paid for the work performed during such calendar week within three (3) days after the last day worked in such week. Any employee reporting for work after being ordered to do so shall receive not less than a full day's pay for that day.

(d) No employee shall be required or allowed to work more than nine (9) hours in any one day, nor more than fifty-four (54) hours in any one week; provided, however, that where the employee is engaged in taking inventory he may be required or allowed to work such overtime as may be necessary to complete the taking of the inventory.

(e) All regular employees (i.e. employees exclusive of Friday and Saturday Help) of an Employer shall receive one week's vacation with full pay for each twelve-month period of employment; but all such employees who have had three or more years of employment with an Employer shall receive two weeks vacation with full pay.

All time lost from employment because of absence from work through sickness or other emergency or temporary lay-off shall be considered as time worked for the purpose of determining the length of employment.

Vacation periods shall be fixed by the Employer to suit the requirements of his business but as far as possible and practicable vacations will be given between May 1 and September 30, inclusive.

A week's vacation pay shall consist of the sum arrived at by multiplying the employee's straight time hourly rate at the time of his taking his vacation by the average num-[fol. 16] ber of hours in his scheduled work weeks during the year preceding the taking his vacation. Any employee who has not been with the Employer for a year, but who has worked for the employer six months or more, and has his employment severed for a reason other than a quit without cause, or discharged for cause, shall receive upon severing of employment a pro-rate vacation pay in ratio to the time worked bears to his rate of vacation pay for one week.

Employees who are qualified for vacation and have their employment severed for reasons other than a quit without cause, or discharge for cause, and who have worked any period subsequent to that for which they have received a vacation shall likewise receive upon severance of employ-

ment a prorate vacation pay as provided in the prorate formula in the above paragraph.

Sec. V. Schedule of Wages

The following schedule of minimum wages shall be maintained by the parties hereto during the period of this agreement, and the Employer shall and hereby agrees to pay wages in compliance therewith; it being understood and agreed that all wages fixed in this contract are so fixed upon the basis of an eight (8) hour day, and forty (40) hour week for both male and female employees worked over a period as set forth in Section IV above. All employees shall receive their pay weekly and within three (3) days after completion of the said week's work.

	Hourly Rate	Overtime Rate	Weekly Rate
Beginner Clerks:			
Less than three months industry experience	$ .91¼	$1.368	$36.50
More than three months but less than six months industry experience	1.10	1.65	44.00
Regular Clerks or checkers	1.25	1.87½	50.00
Receiving Clerks	1.37½	2.062	55.00
Head Clerks	1.37½	2.062	55.00
Managing Clerks	1.67½	2.512	67.00

B. Relief Clerk: Wherever an employee is required by the Employer to change from one store to another during the same day, all time consumed by said employee in going either to or from one store to another shall be considered and paid for as part of his regular day's work.

Sec. VI. Classification of Employees

For the purpose of this contract the classifications of employees above set forth are hereby defined as follows:

[fol. 17] (a) Beginner Clerk: A beginner Clerk is one who has less than six (6) months' experience in the aggregate in the industry irrespective of where such experience may have been had. A beginner Clerk may perform the duties of any classification except managing clerk, receiving clerk or head clerk and shall be paid as stipulated in Section V, Schedule of Wages.

(b) Regular Clerk or Checker: A regular Clerk or Checker is an employee who has had more than six (6)

months' experience in the aggregate in the industry, irrespective of where such experience may have been had. In such instances where only one person is employed at a time in a department the employer may classify and pay such person as a regular clerk or checker.

(c) Receiving Clerk: A Receiving Clerk is an employee who is engaged the major part of his time in the receiving department of the Employer's establishment and who is in charge of and responsible for the receiving of merchandise.

(d) Head Clerk: A Head Clerk is an employee who in addition to the duties of a regular clerk or checker as hereinabove set forth, performs one of the following duties:

1. Acts as a department manager having charge of and supervision over a department, except in such instances as set forth in subsection (b) of this section defining the duties of a regular clerk or checker.

2. Acts as produce buyer.

3. Acts in the capacity of assisting the managing clerk in his duties; or acts in the capacity of assisting the owner where the owner is actively engaged in the business performing the duties of managing clerk, or performs the duties of a managing clerk in his absence, and generally supervises the conduct of a store. The mere occasional or incidental performance of a duty of a managing clerk while the managing clerk is on the job shall not be construed as the basis for classifying an employee as a head clerk. This subsection shall not apply to stores where not more than two people, including the owner, are working therein where either

(1) The owner is actively engaged in the business performing the duties of a managing clerk, or—

(2) Where a managing clerk is employed where the owner is not actively engaged in the business as above set forth in this subsection.

(dd) Where three or more people, even though one be the owner, are working in a store which operates between 7:00 p.m. and 8:00 a.m., or on Sundays, not less than one of the [fol. 18] employees shall be classified as Head Clerk irrespective of the number of employees working during such night hours or Sundays.

(e) Managing Clerk: A Managing Clerk is an employee who acts for and on behalf of the owner and who has one or more of the following duties in any one store. In addition to his work as clerk he has charge of and general supervision over not more than one store; or attends to the proper accounting and collection of the cash and receipts of the business; or has charge of the ordering of merchandise for the store; or is generally the nominal head or foreman thereof. In each store there shall be one managing clerk; provided, however, that in stores where the owner works actively on the premises the major part of the time performing the duties of a managing clerk no managing clerk will be required. No managing clerk shall be employed for less than a full work week. (Absence from work due to illness or emergency excepted.)

(f) The Employer may require any employee to do work not within the duties of one classification, in which event such employee shall be classified and paid under the classification which pays the highest wage, except where an employee of a higher classification is relieved for a lunch period.

Sec. VII. Store meetings

No store meetings shall be held so as to conflict with the regular meetings of the Union, and upon a three-day notice to the Employer of a special meeting the Employer agrees to hold no store meeting in conflict therewith.

Sec. VIII. Caps and Uniforms

The Employer shall furnish all gowns and/or aprons and pay for the laundering of same, provided, however, that in the event any employee uses more than three uniforms in any one week the Employer shall have the right, if he so desires, to deduct the sum of twenty-five cents from the employee's pay for the week the employee uses more than three uniforms.

Sec. IX. Charity

The Union shall and hereby agrees to conduct and handle any and all campaigns and drives for charitable purposes among its membership in such instances as it deems advisable but in no event shall the Employer carry on any charitable campaign among his employees.

Sec. X. Visits to stores

It is agreed by both parties hereto that the business representatives shall have the right and shall be allowed by the [fol. 19] Employer to visit any and all stores for the purposes of making inquiries from the employees relative to information about working conditions, violations of working conditions, complaints of members of the Union, and/or any violations of this agreement.

Sec. XI. Suspended or Expelled Members of the Union

When any member of the Union is suspended or expelled, the Employer shall and hereby agrees to discharge such member within seven (7) days after receiving notice from the Union of such suspension or expulsion.

Sec. XII. Holidays

The following holidays shall be observed and each regular employee shall be paid for the same except when without permission of the Employer the employee fails to report for work either the day before or the day after the holiday: New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Admission Day, Thanksgiving Day and Christmas Day. It is further agreed that whenever such holidays fall upon a Sunday they shall be observed upon the following Monday, and it is further agreed that said holidays shall be granted as days off to employees in addition to their regular days off.

Sec. XIII. Bond

Wherever the Employer requires the bonding of any employee or the carrying of any insurance for the indemnification of the Employer, the premiums for the same shall be paid for by the employer.

Sec. XIV. Strike or Lockout

It shall not be a violation of this contract, nor shall any employee be discharged or discriminated against, for refusing to work for or to sell or handle the merchandise or products of or from any establishment or any individual, firm or corporation, while such individual, firm or corporation is under lockout or is under a strike, or is listed in the official "We don't patronize" list of the Central Labor

Council of Contra Costa County. Provided, however, that this section shall not apply in such instances where a lockout exists or a strike is called by any organization considered dual in character by the American Federation of Labor, or is conducting itself at the time of said lockout or strike contrary to the principles and practices of the American Federation of Labor.

Sec. XV. Board of Adjustment

In order to afford the parties opportunity of investiga-[fol. 20]tion into alleged grievances and violations of contract, and also of discussing matters that may be of mutual concern, an Industry Board of Adjustment shall be created composed of three representatives from each side. The Board shall meet at such regular times as may be determined by the parties and shall operate under such rules as they may determine.

Sec. XVI. Terms of Agreement

The term of this agreement shall be one (1) year from its effective date and may be renewed thereafter for like periods of time either as is or with changes or amendments in the manner following:

(a) If neither party to this contract, prior to thirty days before the expiration of the year term then in existence, notifies the other party in writing of its desire to rescind or make any change or amendment in said contract, then said contract shall be automatically extended and renewed for the following year.

(b) In the event that either party is desirous of the renewal of same with any change or amendment, the party desiring such change or amendment shall give notice of the same to the other party not less than thirty days before the expiration of the year term then in existence, and shall specify in said notice the change or amendment desired. In the event that such change or amendment is agreed to by both parties hereto before the expiration date of the year term then in existence it shall be incorporated into and made a part of this contract; but in the event said parties cannot mutualiy agree to the acceptance of said change or amendment, or any other change or amendment to take the place of that proposed, this contract shall not be renewed

for another year, and shall terminate and become null and void upon the expiration of the year term then in existence, unless the parties hereto agree to submit the matter in controversy to arbitration. In the latter instance, it may be agreed to continue the existing agreement during the time the arbitration proceedings are pending. Notwithstanding anything herein contained to the contrary, Section XVIII shall in any and all events continue in full force and effect for the two year period from September 19, 1946, and in addition shall be part of and incorporated into any contractual relations of the parties during said two year period.

(c) The effective date of this agreement is September 19, 1946.

(d) This agreement shall be binding upon the heirs, executors and assigns of the parties hereto.

(e) No employee shall suffer any reduction in wages or general working conditions by reason of the signing of this agreement.

[fol. 21] Sec. XVII

An employee who is required to leave his employment through action of any governmental agency, or who voluntarily leaves his employment for the purpose of joining with the armed forces of the United States, shall, when his forced or voluntary absence ceases without dishonorable discharge or severance, and if application be made within sixty (60) days therefrom, be reinstated to employment upon his request, without loss of seniority and without detriment of any benefits of employment which existed at the time of his leaving employment, or which shall have accrued in the interim between his leaving employment and his return to work, and wherever possible to the position which he held when leaving employment, or to one providing not less remuneration than his original position.

In cases where the returning employee has suffered a disability which makes it impossible for him to perform his former work, or work similar thereto, he shall nevertheless be reinstated in employment in such position as may be within the ability of the employee to perform.

Sec. XVIII

The Union agrees that it shall not request premium pay for any night or Sunday work, as such, for a period of two (2) years from September 19, 1946.

—— Firm name; —— Address, —— City. By ——, Retail Clerks' Union, Local 1179. By ——.

Store Card No. —; Active Members ——; Non-Active Members ——.

[fol. 22] [File endorsement omitted]

In Superior Court of Contra Costa County

[Title omitted]

[fol. 23] Memorandum in Opposition to Preliminary Injunction and Temporary Restraining Order, and Motions to Dissolve Temporary Restraining Order, and to Deny the Preliminary Injunctions—Filed May 26, 1947

Come now John Hughes and Louis Richardson, in their individual and such representative capacities as they may have, and such of the defendants above named who have been regularly served in the above entitled action, by their attorneys, and file this above described memorandum and make the above described motions. The motions are based on the papers and pleadings on file herein, the Counter Affidavits of John Hughes and Louis Richardson, and this memorandum.

I

There Are No Facts Alleged in the Complaint Or in the Papers on File to Warrant an Injunction Against Defendants on the Theory of Attempt to Induce Breach of Contract.

The plaintiff is apparently primarily proceeding on the theory that this Court should use its drastic equity power of injunction on the grounds that the defendants were inducing or attempting to induce a breach of an alleged contract between plaintiff and Retail Clerks Union, Local No. 179, herein called the union. Parenthetically, it might be noted that the document attached as Exhibit A to the complaint is not only undated and nowhere names the

plaintiff as a party, but also expressly states in Section 1 that the bargaining agents are the Union and an unidentified "Employer Association," not a party to this suit.

Assuming the existence of such a contract, however, no facts are alleged which disclose any course of conduct by [fol. 24] the defendants that could reasonably cause a breach of contract between plaintiff and the Union. An analysis of the complaint demonstrates this. Paragraphs I, II and III of the complaint are formal allegations identifying the parties. Paragraph IV quotes a portion of Exhibit A. Paragraph V alleges that defendants demanded (1) that a certain proportion of Negro clerks be hired at the Canal Store, and (2) That certain employees be discharged. Paragraph IV also contains the conclusion that defendants' action is "beyond the terms and provisions" of the contract between plaintiff and the Union. Nowhere is it alleged that defendants requested that nonunion employees be hired, or that any employees be hired except members of the Union in good standing and through the office of the Union. The Union, having a closed shop, must of course admit Negroes to membership (*James* v. *Marinship Corp.*, 25 Cal (2d) 721) and presumably could supply Negro clerks. If the Union could not supply Negro clerks, under the provision of Section II of the contract that "in the event the said Union cannot meet the request of the Employer for an employee," the plaintiff could hire Negroes, providing they joined the Union within the specified time.

The request to increase the proportion of Negro clerks is clearly compatible with the contract. Moreover, the action of the defendants in requesting the discharge of certain employees if acceded to by plaintiff certainly would not violate the contract. Section III of the contract, the only applicable section, prevents discharge of an employee for (1) "upholding Union principles;" (2) Serving on a com- [fol. 25] mittee of the Union or an affiliate; (3) failing or refusing to purchase stocks, etc. of any company. Obviously, none of these provisions have the remotest relation to a request for a discharge of employees "connected with the firing of a pistol and the subsequent arrest of Mr. McKennly Jackson" (Complaint, page 5, lines 28-29).

Paragraph VI alleges merely that defendants are picketing or causing picketing. The right of the defendants to

picket will be discussed in detail below. The related allegations in Paragraph VII (irreparable damage), Paragraph VIII ("right to do business") and Paragraph X (adequateness of legal remedy) will likewise be treated hereafter.

Paragraph IX, after alleging that picket lines are effective, continues that the "purposes" of the picket line "would be contrary to the terms of "the agreement between plaintiff and the Union." A short answer to this Paragraph, is that it accuses the *defendants* of the *breach* of contract to which they are not a party, a legal impossibility.

Paragraph XI alleges a conspiracy between the defendants to induce a breach of contract, and picketing in furtherance of the conspiracy. As pointed out above, all the alleged demands of the defendants, if acceded to by plaintiff, would not necessarily violate the contract. Hence the alleged conspiracy to induce a breach stands on no firmer ground than the alleged inducement itself. One cannot conspire illegally to do a lawful act.

[fol. 26] Assuming arguendo, that defendants did induce or attempt to induce a breach of contract, an injunction is still improper. In Boyson v. Thorn, 98 Cal. 578, California refused to follow precedents from other jurisdictions and held that an injunction would not issue to prevent C from inducing B to violate his contract with A. This case was California law until Imperial Ice Co. v. Rossier, 18 Cal. (2d) 33, which in effect reversed the Boyson case. However, in the Rossier case the Court specifically exempted from the tort of inducing breaches of contracts, cases involving attempts to improve working conditions. The Court stated (at page 35):

> "The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer."
>
> (Citing among other authority. Restatement of Torts, Section 767, Comment d, which specifically illustrated the type of privilege to include activity to encourage employment of a particular race).

Moreover, before an injunction would be permissive it must be shown that the defendants had knowledge of the contract and its terms. The Court stated (page 37):

> "The act of inducing the breach must be intentional. If the actor had no knowledge of the existence of the contract or his actions were not intended to induce a breach, he cannot be held liable though an actual breach results from his lawful and proper acts." (citing cases).

In the instant case, it is nowhere alleged that any of the defendants had any knowledge of the contract, or its terms, and indeed the opposite is shown (Counter Affidavits of [fol. 27] Hughes and Richardson). It is submitted that no basis for injunction has been established on the grounds of inducing breach of contract.

II

The Defendants Have a Constitutional Right to Picket Under the Fourteenth Amendment of the Federal Constitution.

The cases establishing the right to picket, and the qualifications on this right, are numerous and recent. The leading cases and, it is submitted, those that control this case are New Negro Alliance v. Sanitary Grocery Company, 303 U. S. 552; Thornhill v. Alabama, 310 U. S. 88; A. F. of L. v. Swing, 312 U. S. 321; Cafeteria Union v. Angelos, 320 U. S. 293; McKay v. Retail Etc. Union, 16 Cal. (2d) 311; Park and Tilford Corp. v. Teamsters, 27 Cal. (2d) 599; and In re Lyons, 27 Cal. App. (2d) 293.

The New Negro Alliance case presents a factual situation in all material respects on all fours with the present case. The facts of that case were that petitioners, a voluntary Association advocating the economic advancement of Negroes, requested the Grocery Company to adopt a policy of employing Negro clerks in certain of its stores; the Company ignored the requests; the petitioners caused a person to picket one of the stores, carrying placards urging persons not to patronize the store because it did not hire Negroes; there were no threats or intimidation, the picket was peaceful and orderly. The Court held that there existed a labor

dispute within the meaning of the Norris-LaGuardia Act, and that the trial court erroneously enjoined the picketing. The Supreme Court stated (at page 561):

> [fol. 28] "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation.

The Court held the Trial Court in error in its finding that the laws relating to labor disputes had no application because "it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions . . . (Page 560).

The right to picket is not of course limited to trade unions nor to employees of the establishment being picketed. See In re Lyons, supra; A. F. of L. v. Swing, supra; Park and Tilford Etc. Corp. vs. Teamsters, supra. In the Lyons case, a union was attempting to compel an employer to close on Sundays The Court stated (at page 295):

> "Unions have no greater right to attempt to force a place of business to close on Sundays than has any other group of citizens and at the same time no less right. We must measure the right of the respective parties to Sunday closing controversy by general principles . . ."

Therefore, this case might be decided upon principles of those cases dealing generally with picketing.

There can no longer be question that the right peacefully to picket is encompassed within the constitutional guarantee of freedom of speech and freedom of dissemination of ideas. Thornhill v. Alabama, supra; A. F. of L. v. Swing, supra, [fol. 29] Park and Tilford Etc. Corp. v. Teamsters, supra; Lisse v. Local Union, 2 Cal. (2d) 312. Peaceful picketing cannot, under the Fourteenth Amendment, be prevented

by statute (Thornhill v. Alabama, supra) nor by injunction in a State Court (A. F. of L. v. Swing, supra).

In the recent Park & Tilford case, the Court held that peaceful picketing could not be enjoined regardless of the object of such picketing. Even though the picketing was in support of demands which were not only "ill advised but unlawful" (27 Cal. (2d) at 603), it was held that while the demands could be enjoined, the picketing could not. In this case, the defendant union represented none of the plaintiff's employees, a majority of whom belonged to another union. The defendants demanded that the plaintiff sign a closed shop agreement with it, although had the plaintiff done so, the plaintiff would have been in violation of the National Labor Relations Act. The Plaintiff properly, the Court said, refused this demand and the defendants picketed the plaintiff employer's place of business. In affirming the right to picket the Court stated (27 Cal. (2d) at 607):

> "In the present case, the unlawfulness of defendants' conduct lies in their demands that plaintiff sign a closed shop contract with them and coerce its employees to join defendant unions before they have obtained the requisite majority. Their concerted action for a closed shop is unlawful when divorced from these demands; it must be divorced when the demands are enjoined.
>
> "Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business . . ."

[fol. 30] Clearly, this disposes of the plaintiff's allegation that defendants are interfering with its "right to do business" (Complaint Paragraph VIII), the "irreparable damage" (Complaint, Paragraph VII) and "loss of customers to competitors." The picketing, being peaceful, is lawful. The demands, (i.e., increasing the proportion of Negroes and demanding the discharge of certain employees,) being lawful, cannot be enjoined. The conduct of the defendants

being protected by the Constitution, the resultant effect on plaintiff is "one of the risks of business."

In its Memorandum of Points and Authorities, plaintiff relies heavily on Steiner v. Long Beach, Local No. 128, 19 Cal. 92d) 676 and Magill v. Building Service Union, 20 Cal. (2d) 506. In the Magill case the Court found that the pickets were disseminating false and untruthful statements. It should be noted firstly, that there is no allegation in the complaint that the defendants uttered any false or untruthful statements in connection with their picketing; on the contrary, the Counter Affidavits affirmatively allege that the placards carried by the pickets were truthful and gave a fair version of the dispute between plaintiff and defendants. (See Cafeteria Union v. Angelos, 320 U. S. 293 for a holding that pickets statements must be viewed liberally and that "loose language" and "undefined slogans" are permissive.) Thus the Magill doctrine is not involved in this case.

In the second place, the Magill case expressly held (20 Cal (2d) at 512) that only the false or misleading state- [fol. 31] ments could be prevented and that if so restrained the defendants could exercise "their right to picket." Hence both the temporary restraining order and the requested preliminary injunction, seeking to enjoin all picketing, go beyond the holding of the Magill case.

The Steiner case involved picketing enmeshed in acts of violence. Obviously, this case is not in point. There is not a word in any of the documents on file herein charging, or from which it could be inferred, that the picketing here was other than peaceful and orderly. Moreover, even in the "violence" cases (Steiner v. Long Beach etc. Union, supra; Milk Wagon Drivers Union v. Meadowbrook, 312 U. S. 287) picketing cannot be enjoined unless there is an overwhelming pattern of violence, so that "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. . . ." Isolated or sporadic instances of violence do not warrant an injunction (A. F. of L. v. Swing, supra; McKay v. Retail etc. Union, supra). Euclid Candy Co. v. International Longshoremen 49 Cal. App. (2d) 137, the only other California case cited by plaintiff, is likewise a case of a pattern of continued violence and one of false and misleading literature, and as such, has been disposed of by the previous discussion.

III

There Are No Facts Alleged Justifying Equitable Relief to Plaintiff.

As already pointed out, the complaint does not allege any facts (as distinguished from conclusions) which justify [fol. 32] an injunction or a restraining order against the defendants. In McKay v. Retail Automobile etc., Union, 16 Cal (2d) 311, 320, the Court stated:

> "It is a fundamental principle that the drastic sanction of equity may not be invoked without a detailed showing of specific facts justifying such relief. This rule is applicable to suits for injunction in labor controversies and has been so applied in this State."

As Justice Traynor stated in the Park & Tilford case, the most recent California utterance on the subject of picketing (27 Cal. (2d) at 608-9):

> "Injunctions in labor disputes have not generally proved to be an effective means of settling them; frequently they have aggravated rather than allayed a conflict. They have the deceptive appeal of the quick and easy and therein lies their danger, for disputes between workers and employers, now often complicated by interneeine disputes among workers themselves, are not always of a comparable simplicity. There are many currents of conflict in the mainstream of labor relations, variable, unpredictable, subsiding at times as quickly as they arise. For the most part they can be controlled, not by the courts but by the Legislature, whenever the necessity arises and to whatever degree the public interest requires."

For the foregoing reasons, it is respectfully submitted that the temporary restraining order should be dissolved, the preliminary injunction should be denied, and that the defendants' Motions with respect thereto should be granted.

Respectfully submitted, Edises, Treuhaft & Condon by Robert Condon, Attorneys for Defendants John Hughes, Louis Richardson, and such of the defendants as have been served.

Dated May 23, 1947.

[fol. 33] (Affidavit of Service by Mail omitted in printing.)

[fol. 34] [File endorsement omitted]

IN SUPERIOR COURT OF CONTRA COSTA COUNTY

[Title omitted]

COUNTER AFFIDAVIT OF JOHN HUGHES—Filed May 26, 1947

STATE OF CALIFORNIA,
County of Contra Costa, ss:

John Hughes, being first duly sworn deposes and says:

That he is the secretary of the Richmond Branch, Progressive Citizens of America, an unincorporated association (not named as a defendant herein) and a member, but not an officer or official of Progressive Citizens of America, an unincorporated association and that he is not an officer of official of Progressive Citizens of America, Canal Club, an unincorporated association; that Progressive Citizens of America, Canal Club, is a subordinate division of Progressive citizens of America, Richmond Branch; that he makes [fol. 35] this affidavit in his individual capacity and in whatever representative capacity this Court may later determine he has.

A majority of the members of Progressive Citizens of America, Richmond Branch and Progressive Citizens of America, Canal Club are workers in various trades and industries in the San Francisco Bay Area, including a number of unemployed members, and including qualified retail clerks. Approximately fifty per cent of the members of both the Richmond Branch and Canal Club are Negroes.

That on or about May 17, 1947, your affiant, Louis Richardson president of the Richmond Chapter of the National Association for the Advancement of Colored People, a Mrs. Russell, a Mr. Harris and a Mr. Clark met with some officials of plaintiff whose names he believes to be Mr. Myers, Mr. Young and an unidentified person who stated that he was the attorney for plaintiff. That your affiant and Louis Richardson were the principal spokesman for the group with your affiant. That your affiant protested to the above described officials of the plaintiff, regarding the actions of

certain employees of plaintiff in connection with the arrest by these employees of one McKennley Jackson, allegedly guilty of petty theft. That the protest was against the action of these employees in using unnecessary force against Jackson in making the arrest, including physically striking Jackson at a time when his hands were being held; that in addition your affiant and those with him protested the reckless firing of a shot from a pistol by one of plaintiff's employees in front of plaintiff's place of business, and in a crowded neighborhood, where children and other residents were endangered by the course of the bullet from the pistol; [fol. 36] That your affiant and those with him requested the discharge or transfer of the employee responsible for the reckless firing of the pistol in a congested area. That plaintiff's representatives admitted that a shot had been fired on the street adjacent to plaintiff's place of business and stated that the employee who fired the shot was no longer working at the Canal Store of plaintiff where the alleged petty theft took place. Your affiant later learned that the employee who fired the pistol was the manager of the store and that he had not been discharged or transferred as stated by plaintiff's representative.

Your affiant and those with him also requested the plaintiff's representatives to hire gradually at the Canal Store of plaintiff Negro clerks until the proportion of Negro clerks to white clerks approximated the proportion of Negro and white customers. Your affiant and those with him requested that the increase in the proportion of Negro to white clerks take place as white clerks quit their employ or were transferred by plaintiff. Your affiant and those with him explicitly stated that they were not requesting the discharge of any of the present employees of the Canal Store, but were requesting only the vacancies be filled with Negroes until the approximate proportion was reached. That approximately 50% *per cent* of the customers of Canal Store are Negroes. Plaintiff's representatives refused to discuss the subject of having the Negro and white clerks at the Canal Store approximate the proportion of Negro and white customers. At this point the discussion ended.

[fol. 37] That your affiant, and he is informed and believes, those with him, had no knowledge of any alleged contract or any of the provisions of such contract, between plaintiff and Retail Clerks Union, Local No. 179, or any other union. That your affiant has been informed and believed that some

or all of plaintiff's employees were members of the Retail Clerks Union, Local 179. That approximately a year ago your affiant visited the offices of Retail Clerks Union, Local No. 179. That he was informed by officials of such Union that the Union accepted Negroes as members and had no objection to the hiring of Negro clerks by the plaintiff, providing that such Negroes became members of the Union.

That your affiant is informed and believes that Retail Clerks Union, Local 179, has Negro members unemployed and can supply qualified Negro clerks to any employer requesting such clerks. That Progressive Citizens of America, Richmond Branch and Progressive Citizens of America, Canal Club, have as members Negroes who are qualified clerks and can supply such persons to Retail Clerks Union, Local 179 or to plaintiff, and such persons will join Retail Clerks Union, Local No. 179.

That on or about May 19, 1947, members of Progressive Citizens of America, Richmond Branch and of other organizations picketed plaintiff's Canal Store and continued until May 21, 1947, when picketing ceased. That there were never more than six pickets patrolling an area more than 100 feet wide. That the pickets were peaceful, that there was violence, and that plaintiff's employees and customers had [fol. 38] free egress and ingress to the said store without harassment or molestation. That the pickets were orderly and no comments to any of the plaintiff's customers or employees. That the pickets carried placards which were truthful and contained no misrepresentations or fraudulent statements. That the words on the placards were to the effect that plaintiff refused to hire at its Canal Store a proportion of Negro and white clerks approximating the proportion of Negro and white customers at such store; and that plaintiff refused to discharge or transfer the employee who fired a pistol in the congested area adjacent to plaintiff's store.

Further your affiant sayeth not.

John E. Hughes.

Subscribed and sworn to before me on this 23rd day of May, 1947. Robert L. Condon, Notary Public in and for the County of Contra Costa, State of California. (Seal.)

[fol. 39] [File endorsement omitted]

IN SUPERIOR COURT OF CONTRA COSTA COUNTY

[Title omitted]

COUNTER AFFIDAVIT OF LOUIS RICHARDSON—Filed May 26, 1947

STATE OF CALIFORNIA,
County of Contra Costa, ss:

Louis Richardson, being first duly sworn, deposes and says:

That he is the president of the Richmond Chapter, National Association for the Advancement of Colored People, an unincorporated association, and a member, but not an officer or official of the National Association for the Advancement of Colored People, both herein sometimes collectively called the NAACP; the primary purpose of the NAACP is to promote the social and economic advancement of Negro people; to assist Negroes in finding employment [fol. 40] and to encourage in business and industry full and fair employment of Negroes. Of particular concern to the Richmond Branch of NAACP is finding jobs for, and preventing discrimination against, the employment of unemployed Negro citizens; that he makes this affidavit in his individual capacity and in whatever representative capacity this Court may later determine he has.

A majority of the members of the NAACP are workers in various trades and industries in the San Francisco Bay area, including a number of unemployed members and including qualified retail clerks. Approximately ninety-eight per cent of the members of both the Richmond Chapter and the National NAACP are Negroes. There are approximately five hundred members of the Richmond Branch of the NAACP.

That on or about May 17, 1947, your affiant, John Hughes, secretary of one Richmond Branch, Progressive Citizens of America, a Mrs. Russell, a Mr. Harris and a Mr. Clark met with some officials of plaintiff whose names he believes to be Mr. Myers, Mr. Young and an unidentified person who stated that he was the attorney for plaintiff. That your affiant and John Hughes were the principal spokesmen for the group with your affiant. That your affiant protested

to the above described officials of the plaintiff regarding the actions of certain employees of plaintiff in connection with the arrest by these employees of one McKennley Jackson allegedly guilty of petty theft. That the protest was against the action of these employees in using unnecessary force against Jackson in making the arrest, including [fol. 41] physically striking Jackson at a time when his hands were being held; that in addition your affiant and those with him protested the reckless firing of a shot from a pistol by one of plaintiff's employees in front of plaintiff's place of business, in a crowded neighborhood, where children and other residents were endangered by the course of the bullet from the pistol; That your affiant and those with him requested the discharge or transfer of the employee responsible for the reckless firing of the pistol in a congested area; That plaintiff's representatives admitted that the shot had been fired on the street adjacent to plaintiff's place of business and stated that the employee who fired the shot was no longer working at the Canal Store of plaintiff where the alleged petty theft took place. Your affiant later learned that the employee who fired the pistol was the manager of the store and that he had not been discharged or transferred as stated by plaintiff's representative. Your affiant and those with him also requested the plaintiff's representatives to hire gradually at the Canal Store of plaintiff Negro Clerks until the proportion of Negro clerks to white clerks approximated the proportion of Negro and white customers. Your affiant and those with him requested that the increase in the proportion of Negro to white clerks take place as white clerks quit their employ or were transferred by plaintiff. Your affiant and those with him explicitly stated that they were not requesting the discharge of any of the present employees of the Canal Store, but were requesting only that vacancies be filled with Negroes until the approximate proportion was reached. [fol. 42] Plaintiff's representatives refused to discuss the subject of having the Negro and white clerks at the Canal Store approximate the proportion of Negro and White customers. At the point the discussion ended.

That your affiant, and he is informed and believes, those with him had no knowledge of any alleged contract, or any of the provisions of such contract, between plaintiff and Retail Clerks Union, Local No. 179, or any other Union.

That your affiant is informed and believes that Retail Clerk Union, Local 179, has Negro members unemployed and can supply qualified Negro clerks to any employer requesting such clerks. That the NAACP, Richmond Branch, have as members Negroes who are qualified clerks and can supply such persons to Retail Clerks Union, Local 179 or to plaintiff, and such persons will join Retail Clerks Union, Local No. 179.

That on or about May 19, 1947, members of the NAACP, Richmond Branch and of other organizations picketed plaintiff's Canal Store and continued until May 21, 1947, when picketing ceased. That there were never more than six pickets patrolling an area more than 100 feet wide, that the pickets were peaceful, that there was no violence, and that plaintiff's employees and customers had free egress and ingress to the said store without harassment or molestation. That the pickets were orderly and made no comments to any of plaintiff's customers or employees. That the pickets carried placards which were truthful and contained no misrepresentations or fraudulent statements. That the words on the placards were to the effect that plaintiff refused to hire at its Canal Store a propor-
[fol. 43] tion of Negro and white clerks approximating the proportion of Negro and white customers at such store; and that plaintiff refused to discharge or transfer the employee who fired a pistol in the congested area adjacent to plaintiff's store.

Further your affiant sayeth not.

Louis Richardson.

Subscribed and sworn to before me this 23rd day of May, 1947.

Robert L. Condon, Notary Public in and for the County of Contra Costa, State of California. (Seal)

[fol. 44] [Affidavit of service by mail omitted in printing]

[fol. 45] [File endorsement omitted]

IN SUPERIOR COURT OF CONTRA COSTA COUNTY

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES—Filed May 26 1947

I

Actual fraud consists in any of the following acts . . . "The suggestion as a fact of that which is not true by one who does not believe it to be true;" California Civil Code 1572.

II

Untruthful picketing constitutes illegal economic coercion and will be enjoined. The Constitutional guarantee of free-[fol. 46] dom of press, assemblage and speech has as an incident the right of workmen to combine to bring certain forms of economic pressure to bear upon an employer, provided however, that the object sought to be accomplished thereby has a reasonable relationship to the betterment of labor conditions and they act reasonably and honestly.

Steiner vs. Long Beach, Local No. 128 (1942; 19 Cal., 2nd 676)

A. "The policy of this State which characterizes the use of false or fraudulent statements in picketing is unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech."

Magill Bros. vs. Building Service etc. Union, 20 Cal. 2nd 506.

III

An employer is entitled to an injunction prohibiting picketing of his business when the following facts exist: (1) None of its employees are engaged in a labor dispute or strike against it and are satisfied with all terms of their employment including wages, hours and working conditions; (2) The wages and conditions in effect are as good or better than those of any other business of the same nature in the same general locality; (3) The banners and signs carried

by the pickets convey false information to the general public in as far as the employer is concerned.

[fol. 47] Magill Bros. vs. Building Service Etc. Union, 20 Cal. 2nd 506; Euclid Candy Company vs. International Longshoremen and Warehousemens' Union (1942-49 Cal. App. 2nd 137).

IV

Although permitted considerable latitude in picketing the places of business of Lucky Stores, Incorporated, defendants should be held by this Court to the following limitations:

(1) Their conduct should not be fraudulent or lacking in good faith.

(2) They shall be truthful and honest in the exercise of such powers.

(3) They shall act in such a manner as not to violate good morals or natural justice, and if the union's very great powers are exercised in derogation of these rules, they should be enjoined.

Magill Bros. vs. Building Service Etc. Union, 20 Cal. 2nd 506.

V

"The purpose of the defendants in having members of one race discharged in order to employ the members of another race will not justify (this) direct damage to the plaintiff in the conduct of its business." The dispute here is solely racial. The members of the defendant organizations do not belong to a single trade or industry, nor are they picketing Lucky Stores, Incorporated because of grievances of hours, of labor or wages.

The preliminary injunction should therefore, be granted.

A. S. Beck Shoe Corporation vs. Johnson, 274 N. Y. Supp. 946.

Hoey & Hoey, Attorneys for Plaintiff.

[fol. 48] In Superior Court of Contra Costa County

[Title omitted]

Order for Issuance of Preliminary Injunction—May 26, 1947

The hearing on the order to show cause and temporary restraining order heretofore issued out of the Court, comes regularly before the Court at this time, Hoey and Hoey, by Francis Hoey appearing as counsel for plaintiff and moving party, and Edises, Treuhaft and Condon, by Robert Condon, appearing as counsel for the defendants.

Counsel for defendants file in open Court the Counter Affidavits of John Hughes and Louis Richardson.

The matter is argued to the Court by counsel and submitted to the Court for consideration and decision and the Court having fully considered the same and being duly advised in the premises orders that a preliminary injunction issue out of the Court enjoining and restraining said defendants as prayed for in the complaint on file herein.

[fols. 49-51] Bond on injunction for $1,000.00 approved and filed June 5, 1947, omitted in printing.

[fol. 52] [File endorsement omitted]

In Superior Court of Contra Costa County

[Title omitted]

Order Granting Preliminary Injunction—Filed June 5, 1947

An order having heretofore, to-wit: on the 20th day of [fol. 53] May, 1947, issued in the above entitled action requiring the defendants to be and appear before this court at the hour of ten o'clock a. m. on the 26th day of May, 1947, then and there to show cause why they, their agents, servants, employees and attorneys should not be enjoined and restrained during the pendency of this action from the commission of certain acts as in the complaint filed in this action are particularly set forth and described, and proof having been made to the satisfaction of the court that

copies of said order and complaint were personally served upon defendants in the time required by the order, and the hearing of said order having come regularly on to be heard, Hoey & Hoey, by Francis Hoey, appearing as counsel for plaintiff, and Robert Condon appearing as counsel for defendants, and the court being fully advised in the premises, and good cause appearing therefor:

It is hereby ordered that a preliminary injunction be, and the same is hereby granted restraining defendants from picketing or taking position in front of any of the places of business of Lucky Stores, Incorporated, for the purpose of compelling plaintiff to do any of the following acts:

(1) the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores;

(2) the discharge of those employees participating in the apprehension and arrest of McKinnley Jackson, a colored person accused of the theft of six pounds of bacon from one of plaintiff's store units located near the Canal Housing [fol. 54] Project, Richmond, California.

Plaintiff shall give a surety bond in the sum of One Thousand Dollars ($1000).

Dated this 4 day of June, 1947.

Hugh H. Donovan, Judge of the Superior Court.

[fols. 55-58] Citations in usual form showing service on Louis Richardson and John Hughes, filed June 23, 1947, omitted in printing.

[fol. 59] In Superior Court of Contra Costa County

Minute Entry of Judgment—June 23, 1947

Francis Hoey, counsel for plaintiff and Robert Condon appearing in behalf of defendants, appear in open Court at this time.

Thereupon counsel for defendants orally moves the Court to vacate and set aside the order granting preliminary injunction, heretofore made and entered herein; on the grounds that John Hughes and Louie Richardson, two of

the defendants herein, violated said order granting preliminary injunction, by picketing and carrying banners in front of the business of Lucky Stores, Incorporated, the plaintiff herein.

Said motion is submitted to the Court for consideration and decison and the Court having fully considered the same and being duly advised in the premises, orders that said motion to dissolve the other granting preliminary injunction, be and the same is hereby denied.

The Court finds that the said John Hughes and Louie Richardson, are guilty of contempt of Court for wilfully disregarding the order of the Court heretofore made on the 4th day of June, 1947, and it is ordered that said defendants be punished by imprisonment in the Contra Costa County Jail for a period of two (2) days. It is further [fol. 60] ordered that the defendants and each of them, pay a fine of $20.00, to the County of Contra Costa,

Thereupon on motion of Robert Condon, counsel for said defendants, a 10 day stay of execution is granted herein.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

No. 13535

JOHN HUGHES and LOUIS RICHARDSON, Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA, Respondent

PETITION FOR WRIT OF CERTIORARI—Filed June 23, 1947

To the Honorable, the District Court of Appeal, First Appellate District, Division One, of the State of California, the petitioners John Hughes and Louis Richardson respectfully say:

I

That the Superior Court of the State of California in and for the County of Contra Costa, the respondent herein, is

now, and has been at all times herein mentioned, an inferior tribunal exercising judicial functions.

II

That on the 20th day of May, 1947, a Complaint was filed in the said Superior Court entitled "Lucky Stores, Incorporated, a Corporation, Plaintiff, vs. Progressive Citizens of America, an unincorporated association; Progressive [fol. 63] Citizens of America, Canal Club, an unincorporated association; Canal Precinct Club, Richmond Chapter, Progressive Club of America, an unincorporated association; Mrs. E. Williams, individually and in her representative capacity; Mrs. F. Anderson, individually and in her representative capacity; Glen Mapes, individually and in his representative capacity; John Hughes, individually and in his representative capacity; The National Association for the Advancement of Colored People, an unincorporated association; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, Tenth Doe, Eleventh Doe, Twelfth Doe, Thirteenth Doe, Fourteenth Doe, Fifteenth Doe, Sixteenth Doe, Seventeenth Doe, Eighteenth Doe, Nineteenth Doe, Twentieth Doe, Twenty-first Doe, Twenty-second Doe, Twenty-third Doe, Twenty-fourth Doe and Twenty-fifth Doe, Defendants.", being case No. 39861 in the docket of the respondent; that on the 20th day of May, 1947, a summons was issued in the said case, and on the 20th day of May, 1947, a temporary restraining order and order to show cause were issued by the respondent; that on the 27th day of May, 1947, pursuant to the order to show cause, a hearing was held before the Honorable Hugh H. Donovan, Judge of the respondent, at the Court House of respondent in Martinez, California; that at such time and place, Honorable Hugh H. Donovan, Judge of respondent, issued at the request of the plaintiff, Lucky Stores, Incorporated, in said action, a preliminary injunction restraining the defendants, including your petitioners, from picketing or taking a position in front of any of the places of business of Lucky Stores, Incorporated, the [fol. 64] plaintiff in the said action; that a copy of the Order Granting Preliminary Injunction is attached hereto, marked Exhibit A, and by this reference incorporated herein as if set forth in full at this point; that on the 21st day of June, 1947, your petitioners picketed in front of the Canal Store of Lucky Stores, Incorporated, which store is located in the

City of Richmond, County of Contra Costa, State of California, bearing placards which carried the following legend: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize"; that on the 21st day of June, 1947, your petitioners were served with a citation to appear on the 23rd day of June, 1947 before Honorable Hugh H. Donovan, Judge of respondent, and show cause why they should not be adjudged in contempt; that on the 23rd day of June, 1947, Honorable Hugh H. Donovan found and adjudged your petitioners in contempt of the aforesaid preliminary injunction and sentenced your petitioners to two days in the County Jail or to pay Twenty Dollars fine for the said contempt.

III

That the respondent, and the Honorable Hugh H. Donovan as Judge thereof, acted in excess and beyond its jurisdiction in issuing the aforesaid preliminary injunction and in finding your petitioners guilty of contempt in that:

A. On the 21st day of June, 1947, and prior to the 20th day of May 1947, your petitioners and the defendants in the said case No. 39861, above referred to, were picketing to secure a change of employment policy and working condition of Lucky Stores, Incorporated by seeking to have [fol. 65] Lucky Stores, Incorporated hire at its Canal Store in the City of Richmond, County of Contra —, State of California, a number of Negro clerks proportionate to the number of Negro customers of said Canal Store, and to compel Lucky Stores, Incorporated to discharge one employee of its Canal Store. A demand for these changes in employment policy was made by your petitioners upon Lucky Stores, Incorporated before any picketing was done at the said Canal Store, which demand related to future vacancies and did not, with the one exception noted, contemplate the discharge of any of the present personnel of said Canal Store.

B. Your petitioner John Hughes is a member and officer of Progressive Citizens of America, an unincorporated association, an organization with a substantial number of Negroes as members, in the City of Richmond, County of Contra Costa, State of California. Your petitioner Louis Richardson is a member and officer of the National Association for the Advancement of Colored People, an organization with a substantial number of Negroes as members, in

the City of Richmond, County of Contra Costa, State of California.

C. Your petitioners, individually, and as officers of the Progressive Citizens of America and the National Association for the Advancement of Colored People, respectively, and the defendants in Case No. 39861, have an interest in promoting the employment by Lucky Stores, Incorporated of Negro personnel and in improving the employment possibilities of Negro citizens, particularly of those Negro citizens who are members of the defendant organizations.

[fol. 66] D. The picketing conducted by your petitioners in their individual and representative capacities, and by the defendants in Case No. 39861, was designed to promote and foster the aforesaid interest in increasing the employment possibilities of Negro citizens.

E. The City of Richmond, County of Contra Costa, State of California, has a large and growing Negro population in excess of ten thousand persons; unemployment among this Negro population is greatly disproportionate to the unemployment among the white persons in Richmond; traditionally, many industries and occupations are closed to Negroes and will remain closed unless the Negro people can make effective their demand to obtain equality of opportunity for employment and to prevent economic discrimination against Negroes.

F. The picketing by your petitioners on the 21st day of June, 1947, and by the defendants in Case No. 39861, prior to the 20th day of May, 1947, when the aforesaid preliminary restraining order was issued, was peaceful and orderly, without force or violence; the pickets did not prevent the customers and employees of Lucky Stores, Incorporated, in going to and from the said Canal Store; the picketing was unaccompanied by misrepresentation, threats or intimidation of any sort.

G. The right of your petitioners as aforesaid to picket the said Canal Store of Lucky Stores, Incorporated, is one guaranteed by the Constitution of the United States in the First and Fourteenth Amendments thereof, and by Article I, Section 9 of the Constitution of the State of California.

[fol. 67] IV

That counsel for the defendants in the aforementioned Case No. 39861 raised the constitutional and jurisdictional question prior to issuance of the preliminary injunction by motions, a written memorandum and oral argument, and that counsel for your petitioners raised the constitutional and jurisdictional question at the time your petitioners were found guilty of contempt.

V

That your petitioners are without a plain, speedy and adequate remedy other than by the issuance of the writ hereinafter prayed, inasmuch as the respondent has found them guilty of contempt, a non-appealable order.

VI

The real party in interest and the party whose interest would be directly affected by this proceeding is Lucky Stores, Incorporated, a corporation.

Wherefore, your petitioners pray that a Writ of Certiorari be issued out of this Court to the said Superior Court of California in and for the County of Contra Costa, commanding it to certify fully at a time and place specified in said writ, a transcript of the record and proceedings, including the pleadings and all papers on file, in the case entitled "Progressive Citizens of America, an unincorporated association; Progressive Citizens of America, Canal Club, an unincorporated association; Canal Precinct Club, Richmond Chapter, Progressive Club of America, an unincorpo-
[fol. 68] rated association; Mrs. E. Williams, individually and in her representative capacity; Mrs. F. Anderson, individually and in her representative capacity; Glen Napes, individually and in his representative capacity; John Hughes, individually and in his representative capacity; The National Association for the Advancement of Colored People, an unincorporated association; Richmond Chapter of The National Association for the Advancement of Colored People, an unincorporated association; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, Tenth Doe, Eleventh Doe, Twelfth Doe, Thirteenth Doe, Fourteenth Doe, Fifteenth Doe, Sixteenth Doe, Seventeenth Doe,

Eighteenth Doe, Nineteenth Doe, Twentieth Doe, Twenty-first Doe, Twenty-second Doe, Twenty-third Doe, Twenty-fourth Doe and Twenty-fifth Doe, Defendants", Case No. 39861, that the same may be reviewed by this Court, and that thereupon this Court do review said proceeding and do annul said judgment of contempt and said preliminary injunction, and for such other relief as may be just.

Edises, Treuhaft & Condon, By Robert L. Condon, 1440 Broadway, Oakland, California. Tel: Glencourt 7512.

[fol. 69] *Duly sworn to by John Hughes and Louis Richardson. Jurat omitted in printing.*

[fols. 70-72] Exhibit "A" Omitted. Printed side page 72 ante.

[fol. 73] Receipt of a copy of the within Petition for Writ of Certiorari is hereby admitted this 23rd day of June, 1947.

Superior Court of the State of California in and for the County of Contra Costa, W. T. Paasch, by W. E. Tarsell. Francis Collins, District Attorney, Contra Costa County, by Francis W. Collins. Lucky Stores, Incorporated, by Hoey & Hoey, Its Attorneys.

[fol. 74] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

No. 13535

JOHN HUGHES AND LOUIS RICHARDSON, Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF CONTRA COSTA, Respondent

WRIT OF CERTIORARI—Filed July 11, 1947

The People of the State of California to Superior Court of the State of California in and for the County of Contra Costa, Respondent:

Whereas, it has been represented to this court by the verified petition on file herein of John Hughes and Louis Rich-

ardson, the parties beneficially interested, that in a certain action pending before you entitled Lucky Stores, Incorporated, a corporation, Plaintiff, v. Progressive Citizens of America, an unincorporated association; Progressive Citizens of America, Canal Club, an unincorporated association; Canal Precinct Club, Richmond Chapter, Progressive Club of America, an unincorporated association; Mrs. E. Williams, individually and in her representative capacity; Mrs. F. Anderson, individually and in her representative capacity; Glen Napes, individually and in his representative capacity; John Hughes, individually and in his representative capacity; The National Association for the Advancement of Colored People, an unincorporated association; [fol. 75] Richmond Chapter of the National Association for the Advancement of Colored People, an unincorporated association; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, Tenth Doe, Eleventh Doe, Twelfth Doe, Thirteenth Doe, Fourteenth Doe, Fifteenth Doe, Sixteenth Doe, Seventeenth Doe, Eighteenth Doe, Nineteenth Doe, Twentieth Doe, Twenty-first Doe, Twenty-second Doe, Twenty-third Doe, Twenty-fourth Doe, and Twenty-fifth Doe, Defendants; you, exercising Judicial functions, have exceeded your jurisdiction, and that there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy, and

Whereas, by an order of this court duly given and made in the above-entitled action on the 1st day of July, 1947, it was ordered that a writ of certiorari should issue to you,

We, Therefore, Command You, that you certify and return to this court at State Building, in the City of San Francisco, State of California, on the 25th day of August, 1947, at 10 o'clock a. m., a full, true and complete transcript of the record and proceedings in the action aforesaid, including all papers on file, minute orders and other documents on file in said case, to the end that the same may be reviewed by this court and such action taken thereon as of right and as according to law shall be taken and done, and that you then and there have this writ, and in the meantime, we command and require you to desist from further proceedings in the matter to be reviewed.

Witness the Honorable A. F. Bray, J., acting presiding judge and the judges of the District Court of Appeal, First Appellate District, Division One, in the State of

California, attested by my hand and the seal of said court this 1st day of July, 1947.

Walter S. Chisholm, Clerk, District Court of Appeal, State of California, in and for the First Appellate District. (Seal.)

[fol. 76] Receipt of a copy of the within Writ of Certiorari is hereby admitted this 3d day of July, 1947.

Superior Court of the State of California in and for the County of Contra Costa, W. T. Paasch, County Clerk, by M. E. Kelly; Francis Collins, District Attorney, Contra Costa County, by W. Taylor; Lucky Stores, Incorporated, by Hoey & Hoey, by Little, Its Attorneys.

[fol. 77] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

ANSWER AND RETURN TO WRIT OF CERTIORARI—Filed August 15, 1947

To the Honorable, District Court of Appeal, First Appellate District, Division One, of the State of California:

The return of respondent, The Superior Court of the State of California, in and for the County of Contra Costa, and of Lucky Stores, Incorporated, the real party in interest, in obedience of the Writ of Certiorari granted in this proceeding is as follows:

I

[fol. 78] Respondent herein, The Superior Court of the State of California, in and for the County of Contra Costa, is and has been at all times mentioned an inferior tribunal exercising judicial functions.

II

Respondent admits each and every, all and singular, the allegations contained in Paragraph II of the Petition for Writ of Certiorari.

III

Respondent denies that the respondent, The Superior Court of Contra Costa County, acted in excess and beyond its jurisdiction in issuing the preliminary injunction and in finding petitioners guilty of contempt and further, answering Paragraph III, Subdivision A of the Petition, this answering respondent admits that petitioners and defendants in Case Number 39861 did picket the Canal Street Store of Lucky Stores, Incorporated, and did demand the proportional hiring of Negro clerks and the discharge of Lucky employees, but denies that the demands related to future vacancies and alleges the demands made contemplate the discharge of some of the present personnel of said Canal Store.

Alleges that said pickets were placed in front of Lucky's Canal Street Store after the events leading up to the arrest and apprehension of McKinnley Jackson, which events are more fully described in respondent's Exhibit "C," being the affidavit of Benjamin J. Linsner, store manager of the Canal Street store, annexed hereto and incorporated herein [fol. 79] by reference as though fully set forth in this answer.

IV

Denies on information and belief the allegations contained in Paragraph III, Subdivision B, C, and D of the Petition and further by way of answer to Subdivision E of Paragraph III of the Petition respondent denies on information and belief the allegations contained in that part of said Subdivision beginning with the words "the City of Richmond" and ending with the words "equality of opportunity for employment." Respondent denies that Lucky has discriminated against the Negro race and alleges that its policy throughout has been to hire employees on their individual merit and capacity and in this connection respondent refers to the affidavit of Otto Meyer, Vice-President of Lucky Stores, Incorporated, marked Exhibit "A," and the affidavit of Albert West, Secretary-Treasurer of Retail Clerks Union, Local 1179, marked Exhibit "B," annexed hereto and by reference incorporated herein as though fully set forth in this answer.

And further answering the allegations contained in Subdivision F of Paragraph III of the Petition for Writ of Certiorari respondent admits the picketing prior to the 20th

day of May, 1947, and the picketing on the 21st day of June, 1947, was without force and violence, but denies that said picketing was unaccompanied by misrepresentation.

[fol. 80] V

Respondent denies that the right of petitioners to picket the said Canal Street store, or any other store, is one guaranteed by the First and Fourteenth Amendments of the Constitution of the United States or by Article I, Section 9 of the Constitution of the State of California.

VI

Admits the allegations contained in Paragraph IV of the Petition.

All of which the respondent hereby certifies and returns as commanded by said writ.

Hoey & Hoey, Attorneys for Lucky Stores, Incorporated, Real Party in Interest.

[fol. 81] *Duly sworn to by Francis Hoey. Jurat omitted in printing.*

[fol. 82] EXHIBIT "A" TO ANSWER AND RETURN

Affidavit

STATE OF CALIFORNIA,
County of Alameda, ss:

Otto P. Meyer, being first duly sworn, deposes and says:

That he is the Vice President of Lucky Stores, Incorporated, the real party in interest, in the above entitled matter; that he knows of his own knowledge the policy of employment followed by Lucky Stores, Incorporated, in the matter of hiring and discharging its employees, and that the policy long established by said corporation is to hire persons purely upon a basis of physical cleanliness, mental alertness, moral integrity, and qualifications as to experience for a particular job sought to be filled;

That said corporation does not now, nor has it in the past, discriminated against the hiring of persons of the colored race, and in fact does presently employ seven per-

sons of the colored race, to wit: Ed Wallace, John J. Roberts, Joe E. Morris, Arthur L. Warner, Levi Perry, James Wagner, and Hollis Haliburton. The company's experience to date is that its business is not impaired as a result of the employment of Negroes, and the company intends to continue to employ in its stores applicants for employment on the basis of their individual qualifications without regard to race, color or national origin. Notice of the [fol. 83] company's intention was given to a Mr. Mapps and to Hughes and Richardson, petitioners, on or about the 10th day of May, 1947, and on or about that date affiant, as representative of Lucky Stores, Incorporated, refused the demand of Hughes and Richardson that Lucky Stores, Incorporated, employ Negroes in proportion to the number of Negro patrons and refused also to discharge Mr. Benjamin W. Linsner, manager of the Canal Street Store.

Affiant further deposes and says that said corporation has collective bargaining agreements for all of its employees, except executive and administrative employees, with local Labor Unions, in the City and County of San Francisco, County of Alameda, County of Santa Clara, San Mateo County, and County of Contra Costa; all of said Labor Unions are affiliated with the American Federation of Labor; that said collective bargaining agreements provide that corporation, as employer, shall employ only members of the particular Union involved, in good standing and through the office of the Union, provided that in the event the Union cannot meet the request of the employer for an employee, the employer may hire a person not affiliated with such a Union; that such Union shall maintain a list of unemployed members, together with their qualifications, and that said employer corporation, must, in good faith, secure replacements from said list of unemployed Union members, and may only hire a non-member of the Union [fol. 84] when the Union cannot furnish a satisfactory employee.

Affiant further deposes and says that on information and belief that at the present time all of the Unions who are the collective bargaining agents for corporation's employees, have and maintain lists of unemployed persons of said Unions which would contain satisfactory employees should said corporation desire or need additional employees, or to replace any present employee.

Your affiant further deposes and says that during November, 1946, the Knights Political League, a Negro Organization, represented to affiant and other officers of Lucky Stores, Incorporated, that Negroes were having a difficult time obtaining employment in the Bay Area and had not yet been received into retail stores; the representatives of this organization requested that Lucky employ Negroes as well as Whites in its retail stores. That, as a consequence in January, 1947, when a vacancy occurred in the Canal Street Store, the company employed John Roberts, a Negro; he was employed on the same basis as any other store employee, and he was given the same training and opportunity as other employees; that Roberts was first taught the trimming of produce, the sorting of bottles and other relatively simple tasks, and was then given training in stocking the shelves and pricing the goods; that this is the type of training given to all clerks at the beginning of [fol. 85] their employment with Lucky Stores, Incorporated; that thereafter Roberts was put on as a bagger at the checking stand and learned how to check out merchandise, and that finally he was taught to do checking, i.e., totaling the prices of the customers' merchandise and collecting therefor; that he is now a completely qualified sales clerk and is employed on the same basis without discrimination as all other experienced clerks in the store and is in line for advancement to the positions of assistant manager and manager on the same basis as other clerks. That the checkers, including Roberts, check out goods, handle cash, stock the shelves, sign for incoming merchandise, and also perform other necessary work as sweeping the floor, sorting bottles and the like.

Your affiant further deposes and says that early in March, 1947, a second Negro, Joe Morris, was likewise employed on the same basis as Roberts; that both Roberts and Morris are still employed by the company in the Canal Street Store, and in all respects are treated the same and enjoy the same privileges as white employees.

Otto P. Meyer.

Subscribed and sworn to before me this 15th day of August, 1947.

Frederick J. Schoeneman, Notary Public in and for the County of Alameda, State of California. (Seal.)

[fol. 86] EXHIBIT "B" TO ANSWER AND RETURN

Affidavit

STATE OF CALIFORNIA,
County of Alameda, ss:

Albert West, being first duly sworn, deposes and says:

That he is an officer, to wit: Secretary-Treasurer of Retail Clerks Union, Local No. 1179, affiliated with the American Federation of Labor through the Retail Clerks International Protective Association;

That said Retail Clerks Union, Local 1179 entered into a collective bargaining agreement with Lucky Stores, Incorporated, plaintiff corporation herein, on the 19th day of September, 1946;

That said collective bargaining agreement provides, amongst other things, that the employer Lucky Stores, Incorporated, recognizes the Union, Retail Clerks Union, Local 1179 as the sole collective bargaining agency for all employees working for the employer within the jurisdiction of the Union; said agreement further provides that said employer shall employ only members of the Union in good standing and through the office of the Union; that the Union shall maintain a list of unemployed members, together with their qualifications, and in the event said list contains no members satisfactory to the employer, employer may hire a non-member of the Union.

[fol. 87] Your affiant further deposes and says that as Secretary Treasurer of said Union, to wit: Retail Clerks Union, Local 1179, that said Union has at present a list of unemployed members who are qualified to fill any positions which may now be open, or as replacements for present store clerk employees of plaintiff corporation, and that if plaintiff corporation desires or needs new employees or replacements of present employees they could not at present hire any person not a member of the Union, to wit: Retail Clerks Union, Local 1179, except in accordance with the terms and conditions of said collective bargaining agreement.

Your affiant further deposes and says that said Union, to wit: Retail Clerks Union, Local 1179, does not discriminate in accepting applications for membership in said Union, on the basis of color, creed or religion. That such applicants must be persons of good moral character and have the physical and mental ability and alertness to perform the work

required to be done by members of said Union in retail stores.

Your affiant further deposes and says that there are presently members of Retail Clerks Union, Local No. 1179 who are of the colored race, three of whom are presently employed as clerks by plaintiff corporation, Lucky Stores, Incorporated.

Albert West.

Subscribed and sworn to before me this 15th day of August, 1947. Frederick J. Schoeneman, Notary Public in and for the County of Alameda, State of California. (Seal.)

[fol. 88] Exhibit "C" to Answer and Return

Affidavit

State of California,
County of Alameda, ss:

Benjamin W. Linsner, being first duly sworn, deposes and says:

That he is the Manager of the Canal Street Store of Lucky Stores, Incorporated.

That shoplifting is prevalent in the Canal Street Store. That on or about April 20, 1947, Lucky Stores, Incorporated, placed private detectives in the Canal Street Store for the purpose of detecting and preventing shoplifting.

That your affiant further deposes and says that on April 28, 1947, at about 12:45 p. m. he observed that McKinnley Jackson, removed bacon from the self-service meat counter and took a bag of sweet potatoes from the produce department; that Jackson then passed through the check stand with only the potatoes in his apparent possession, and that Jackson paid for only the potatoes; that affiant followed Jackson out of the store, and when he was a few feet outside said, "Hey, Mister, will you please come back into the store? I think there has been a mistake."

Your affiant further deposes and says that Jackson, instead of complying, threw the potatoes in affiant's face and ran across the parking lot adjacent to the Canal Street [fol. 89] Store spilling bacon as he went.

Your affiant further deposes and says that Mr. Young, District Manager for Lucky Stores, Incorporated, was in the parking lot at the time, and that Mr. Young observed affiant and two detectives chasing Jackson; that Mr. Young tried to block Jackson and then tackled him as one would do in football.

Your affiant further deposes and says that Jackson was then asked to go to the store; that Jackson was walking in front of affiant and the two detectives and Mr. Young; that Jackson, on the way back to the store, slipped away between some automobiles and ran across the street.

Your affiant further deposes and says that one of the detectives followed Jackson across the street, and that the detective fired a shot into the ground for the purpose of frightening Jackson and making him stop; that Jackson was finally apprehended in the next block by a Richmond policeman; that the Richmond policeman brought Jackson back to the store and turned him over to the store detectives who held him there for a few minutes until the Richmond Police took Jackson into custody.

Your affiant further deposes and says that no one struck Jackson or in any way molested him except as set forth above.

Benjamin W. Linsner.

Subscribed and sworn to before me this 15th day of August, 1947. Frederick J. Schoeneman, Notary Public in and for the County of Alameda, State of California. (Seal.)

[fol. 90] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION I

[Title omitted]

ANSWER TO PETITION FOR WRIT OF CERTIORARI

Come now Superior Court of the State of California, in and for the County of Contra Costa, and Honorable Hugh H. Donovan, respondents above-named, and Lucky Stores,

Incorporated, and answering the petition for writ of certiorari on file herein admit, deny and allege as follows:

I

That Lucky Stores, Incorporated, as appears from the writ of certiorari on file herein, is the real party in interest in this proceeding.

[fol. 91]

II

Respondent herein, Superior Court of the State of California, in and for the County of Contra Costa, is and has been at all times mentioned an inferior tribunal exercising judicial functions.

III

Respondent denies that respondent, Superior Court of the County of Contra Costa, acted in excess and beyond its jurisdiction in issuing the preliminary injunction and in finding petitoners guilty of contempt.

IV

Denies on information and belief the allegations contained in Paragraph III, Subdivisions B, C, and D of the petition, and further by way of answer to Subdivision E of Paragraph III of the petition respondent denies on information and belief the allegations contained in that part of said Subdivision beginning with the words, "the City of Richmond," and ending with the words, "equality of opportunity for employment." Respondent denies that Lucky has discriminated against the Negro race and alleges that its policy throughout has been to hire employees on their individual merit and capacity.

And further answering the allegations contained in Subdivision F of Paragraph III of the petition for writ of certiorari respondent admits the picketing prior to the 20th [fol. 92] day of May, 1947, and the picketing on the 21st day of June, 1947, was without force and violence, but denies that said picketing was unaccompanied by misrepresentation.

V

Respondent denies that the right of petitioners to picket said Canal Street Store, or any other store, is one guaranteed by the First and Fourteenth Amendments of the Con-

stitution of the United States or by Article 1, Section 9 of the Constitution of the State of California.

VI

Admits the allegations contained in Paragraph IV of the petition.

VII

Respondent, Superior Court of the State of California, in and for the County of Contra Costa, alleges that acting as it did at the time of the hearing prior to the granting of the preliminary injunction upon the verified complaint, counter-affidavits, and argument of counsel with facts before it which would sustain its jurisdiction to issue the preliminary injunction; that pursuant to the agreement reached by counsel for petitioners and counsel for Lucky Stores, Incorporated, as appears more fully from the stipulation on file herein, a citation for contempt was issued and served without an affidavit for contempt or other formalities being carried out.

All of which the respondent hereby certifies and returns [fol. 93] as commanded by said writ.

Hoey & Hoey, Attorneys for Respondents.

[fol. 94] *Duly sworn to by Hugh H. Donovan. Jurat omitted in printing.*

[fols. 95-98] [File endorsement omitted]

In the District Court of Appeal, State of California, First Appellate District, Division One

[Title omitted]

Respondent's Petition for a Hearing by the Supreme Court—Filed December 30, 1947

After Decision by the District Court of Appeal, State of California, First Appellate District, Division One, and Numbered Therein 1, Civil No. 13,535.

[fol. 99] Preface

Respondent, the Superior Court of the County of Contra Costa, is seeking a hearing in this Court after an adverse

decision in the District Court of Appeal, upon the ground that it is necessary to secure uniformity of decision and/or the settlement of important questions of law.

The hearing prayed for is necessary for the settlement of two important questions of law: (1) Whether evidence may properly be received and considered by a District Court of Appeal at the time of the hearing of the Writ of Certiorari; (2) Whether negroes may picket a grocery store, where admittedly no labor dispute exists between the employer and employees, for the purpose of demanding employment of members of their race in proportion to the number of negro customers patronizing this store.

Respondent further contends that on the question of what evidence is admissible before a District Court of Appeal on a hearing of a Writ of Certiorari, a divergence exists between the view taken by the District Court of Appeal in this action and that followed by the District Courts of Appeal in two earlier, yet fairly recent cases.

Respondent contends that in this cause, said District Court of Appeal made a mistake of law, and that said cause is one in which the principle involved is important, [fol. 100] and a serious doubt exists as to the correctness of said decision, and owing thereto, said opinion has done an injustice to respondent Superior Court and also to the real party in interest, Lucky Stores, Incorporated, which may be rectified or corrected only by a hearing in this court, and a revision and reversal of said decision.

Statement of the Case

During the month of November, 1946, officers of the Knights' Political League, a negro organization, explained to representatives of Lucky Stores, Incorporated that negroes had not been employed at retail stores and asked that negroes as well as Whites be employed in Lucky's retail units. When a vacancy occurred in the Canal Street Store, John Roberts, a negro, was hired as a clerk, and subsequent to that time, Joe Morris, a negro, has been employed in a similar capacity. These employees have received the same training and perform duties similar to those of white clerks.

On April 28, 1947, or thereabouts, one McKinley Jackson was observed taking bacon and meat from the delicatessen counter. When he left the store without paying for this

food, he was asked to stop by the store manager. Jackson immediately began to run and was chased by employees of the Canal Street Store, one of whom "tackled" him as one [fol. 101] would in a football game. Then, while walking back to the store, accompanied by employees of Lucky Stores, Incorporated, Jackson slipped away and ran into the area of the housing project. A detective hired by Lucky gave chase, and to frighten Jackson, fired a shot into the ground. A policeman of the City of Richmond finally apprehended Jackson who was then returned to the store where he was detained until taken into custody by the Richmond police. Following this episode, demand was made upon Lucky Stores, Incorporated "(1) To hire negro clerks in proportion to negro customers patronizing the Canal Street Store; (2) To discharge those employees who were involved in the apprehension and arrest of McKinley Jackson." These demands Lucky refused.

A picket line was then established by the Progressive Citizens of America and the National Association for the Advancement of the Colored People in front of the Canal Street Store, the pickets carrying placards which represented Lucky Stores, Incorporated as having adopted a "Jim Crow" policy, and which asked that Lucky Stores, Incorporated meet the demands previously made.

A complaint for injunction was filed on behalf of Lucky Stores, Incorporated in the Superior Court of the County of Contra Costa, against the Progressive Citizens of America and several individuals, praying for an injunction per- [fol. 102] manently restraining the named defendants therein from demanding of Lucky Stores, Incorporated: (1) The hiring of negro clerks, such hiring to be based upon the proportion of negro and white customers patronizing plaintiff's store, (2) The discharge of those employees of Lucky Stores, Incorporated who participated in the apprehension and arrest of McKinley Jackson, a colored person, accused of the theft of six pounds of bacon from one of Lucky's store units.

A hearing was held and an order granting a preliminary injunction based upon the verified complaint, counter-affidavits, points and authorities, and argument was made restraining defendants from compelling Lucky Stores, Incorporated to do either of the acts named in the complaint.

Then, on the 21st day of June, 1947, defendants, Hughes

and Richardson, picketed the Canal Street Store of Lucky Stores, Incorporated at Richmond, California, carrying placards which read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." Hughes and Richardson were adjudged in contempt of the order granting the preliminary injunction and sentenced by the Superior Court of the County of Contra Costa to two days in the County Jail or to pay a fine of $20.

On the same day, a petition for a Writ of Certiorari was [fol. 103] filed in the District Court of Appeal; and, later, on the 1st day of July, 1947, the Writ issued.

A return to the Writ of Certiorari was filed on behalf of Lucky Stores, Incorporated in which were incorporated the affidavits of Mr. Otto Meyer, vice-president of Lucky Stores, Mr. Benjamin Linsner, manager of Lucky's Canal Street Store, and Mr. Albert West, secretary of the Retail Clerks Union. None of these had been filed nor considered by the lower Court. The matter was submitted to the District Court of Appeal upon oral argument and written briefs.

Three questions were raised in the District Court of Appeal:

> 1—Whether or not the affidavits incorporated in the return of the real party in interest, Lucky Stores, Incorporated, should be considered by the District Court of Appeal;
>
> 2—Did the picketing which was enjoined by the lower Court constitute an inducement of breach of the collective bargaining agreement between Lucky Stores, Incorporated and the Retail Clerks Union; and
>
> 3—Whether the demand by defendants for proportional hiring of negroes, based upon the number of negro customers patronizing Lucky's Canal Street Store, was an improper objective, and can this demand properly be urged through the medium of a picket line where there is no labor dispute between the employer and the group or persons who are picketing?

[fol. 104] On November 20, 1947, the District Court of Appeal rendered its decision annulling the contempt order of the Superior Court of Contra Costa County, The District Court concluding: (1) That the actions of defendants,

Progressive Citizens of America and the National Association for the Advancement of the Colored People, and the other named individuals, in picketing the Canal Street Store did not constitute an inducement of breach of the collective bargaining agreement between Lucky Stores, Incorporated and the employees; (2) That it could not properly receive and consider affidavits incorporated in the return of Lucky Stores at the hearing of the Writ, and (3) That the demand for proportional hiring was a proper one when urged through the medium of a picket line.

[fol. 105]

I

The Affidavits Incorporated in the Return of the Real Party in Interest, Lucky Stores, Incorporated, Should Have Been Considered by the District Court of Appeal at the Proceeding in Certiorari.

The affidavits of Lucky's employees were incorporated in the Return to the Writ of Certiorari. These had not been considered by the lower Court at the time of the granting of the preliminary injunction. The District Court of Appeal, in its opinion, held that they could not properly be considered by it because they contained facts not before the trial court. (4 Cal. Jur. P. 1107, Sec. 69)

However, in *Wilde vs. Superior Court*, 53 Cal. App. 2nd 168 (1942), the Court permitted the introduction of evidence in the Appellate Court which not only supplemented, but contradicted the record of the lower Court, and previous decisions had recognized that further and additional evidence in the reviewing Court or the inferior tribunal may be proper to supplement the record, though not to contradict it, *Los Angeles vs. Young*, 118 Cal. 295 (1897), *In re Madera Irrigation District*, 92 Cal. 296, 335 (1891), *Blair vs. Hamilton*, 32 Cal. 50, and again in *Triplett vs. Superior Court*, 57 Cal. App. 2nd, 536 (1943), the Appellate Court concluded that it could receive and consider the new evidence, not for the purpose of impeaching the record of the Court below, [fol. 106] but for the purpose of explaining and supplementing that record, and for the purpose of developing the true facts upon which must rest the answer to the question of the lower Court's jurisdiction.

The facts stated in the affidavits go largely to a specification showing that Lucky Stores, Incorporated is not discriminating against negroes. No evidence of any discrimi-

nation was introduced by the petitioners in the lower Court, and the claim that the Court should in effect take judicial notice of such discrimination was first made in this Court, nor was there any assertion by petitioners in the lower Court that it was without jurisdiction to decide the questions there involved.

A divergence exists between the conclusion reached by the District Court of Appeal in its opinion in this case and that arrived at by the District Court of Appeal in the earlier *Wilde* and *Triplett* Cases. Therefore, on the ground that it is necessary to secure uniformity of decision on the question of what is admissible before a District Court of Appeal upon a hearing of a Writ of Certiorari, Respondent respectfully requests that an order be made that this case be heard and determined by this Supreme Court.

[fol. 107] II

The Objective of Employment of Negroes in Proportion to Negro Patronage Is an Improper One.

The record of the lower Court and the opinion of the District Court of Appeal plainly reveal the objective sought by petitioners in placing a picket line in front of Lucky's Canal Street Store; the line was placed there for the purpose of securing hiring by Lucky of negro clerks in proportion to negro patronage.

In the cases of *James vs. Marinship*, 25 Cal. 2nd 721 (1944), *Williams vs. International Brotherhood of Boiler Makers*, 25 Cal. 2nd 586 (1946), *Thompson vs. Moore Dry Dock Company*, 27 Cal. 2nd 595 (1946), the Court was concerned with the question of racial discrimination in employment, and in all three, the principle announced precluded discrimination in favor of negroes and against Whites. Nevertheless, the broad inference to be drawn from these cases is that the law will afford protection not only to negroes who are discriminated against, but will also protect against discrimination to Whites. The duty created by the rules in these cases is the general one to refrain from discrimination of any type, and not merely to refrain from discrimination against negroes. Thus, the objective of proportional hiring which petitioners sought to attain through the establishment of a picket line was an improper [fol. 108] one when viewed in the light of these three cases. The objective compels, rather than prevents, discrimination

because it necessarily precludes a selection of employees on the basis of individual merit and capacity and substitutes in its stead, the solitary standard of the color of a man's skin. On the facts of the instant case, then, there is danger of discrimination against those Whites who do have the ability to act as clerks in Lucky's Canal Street Store, but who are excluded because of the hiring of negro clerks in proportion to the number of negro customers patronizing that store, has the effect of diminishing the number of White clerks who could or would have been hired had the "proportional hiring" principle not been adopted.

The record shows, further, that Lucky employed both Whites and negroes and that the hiring is accomplished without adverting first to the race or color of the applicant. Now, the demand of petitioners, if followed, would compel discrimination rather than prevent it, and if successful in attaining the demands made, then the dangers pointed out by Judge Rosenman in the case of *A. S. Beck Shoe Corporation vs. Johnson*, 274 N. Y. S. 946; 163 Misc. 363 (1934), become apparent:

> ". . . If they were permitted and if they succeeded in their purpose, it would then become equally proper for some organization composed of white persons to picket the premises, insisting that all negro employees be discharged and that white employees be re-employed. [fol. 109] If this were permitted, there is substantial danger that race riots and race reprisals might result in this and other communities. They would serve as precedent for similar activity in the interest of various racial or religious groups. The effect upon the social well-being of communities throughout the state would be far reaching."

Also, it may be asked, if petitioners' principle be adopted, what is to prevent any pressure group, whether organized on racial, religious, national or other arbitrary lines, from bringing economic pressure to bear upon an employer for the purpose of compelling an employment of its members in proportion to the patronage which the employer enjoys from that group?

Recent legislative enactments in several eastern states make it unlawful for an employer to consider race as a factor

in determining an applicant's eligibility. (Chapt. 118, New York Laws, 1945, Sec. 131; New Jersey 1937 Revised Statutes, Chapt. 25, Title 18.) These states deny, therefore, to anyone the right to adopt a policy of employment based upon the number or proportion of a race which patronizes a particular business establishment; and again, Ludwig Teller in his work: "A Labor Policy for America", 1945, proposes the prohibition of discrimination in employment "because of such persons' race, color, creed. . . ." (See also Executive Order No. 9346, dealing with the President's fair employment practices)

[fol. 110] Justification for the picketing in this case is urged by petitioners upon the ground that Lucky has discriminated against negroes in the employment of clerks in its Canal Street Store. The claim of justification for the demand, on the ground of discrimination, was first made in the Petition for Writ of Certiorari [1] and in the supporting Memorandum; [2] the Return of Lucky and specifically the affidavit of Otto Mayer, reveal that it has adopted a non-discriminatory employment policy, and that negroes and Whites were employed in the Canal Street Store on terms of equality.[3] This affidavit, along with the others incorporated in the Return, were not considered by the District Court of Appeal on the ground that they were not before the lower Court at the time of the hearing on the preliminary injunction. These assertions by Lucky Stores, Incorporated [fol. 111] were not and cannot be controverted. In fact, the lower Court must be deemed to have found on the basis of pleadings and evidence before it that Lucky did not dis-

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[1] . . . traditionally, many industries and occupations are closed to negroes and will remain closed unless the negro people can make effective their demand to obtain equality of opportunity for employment and to prevent economic discrimination against negroes." (Petition, p. 8, par. 3.)

[2] "This was part of a general purpose of petitioners to combat racial discrimination in employment against negro citizens." (Memo. p. 5.)

[3] Actually the last stated facts may be drawn as an inference from the allegations of the complaint. (Tr. 34, 36.)

criminate, and that negro clerks were in fact employed by Lucky.[4]

[fols. 112-113] Petitioners persist in their assertion that justification for the picketing can be made out because of racial discrimination . . . :

". . . the purpose of the picketing here by the petitioners was to combat racial discrimination (Pet. Supp.

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[4] *Tr.* (1) P. 6, Verified Complaint.

VI ". . . in that it is acting in concert with said Canal Club and the other defendants to enforce unreasonable and unjustifiable demands of defendants for the hiring of *additional negro clerks* in stores of the plaintiff.

(2) p. 7, Verified Complaint.

VIII "Plaintiff alleges that the establishment of picket lines in front of plaintiff's stores in order to enforce the demand for hiring of additional negro clerks. . . ." Transcript (3) p. 22, Memorandum in Opposition to Preliminary Injunction:

I "the request *to increase the proportion of negro clerks* is clearly compatible with the contract.

(4) p. 30, Counter Affidavit of Louis Richardson, petitioner herein. "Your affiant, and those with him request that the increase in *in* the proportion of negro to White clerks take place as white clerks quit their employ or were transferred by plaintiff, and also at p. 41 of the tr: ". . . that the words on the placards were to the effect that plaintiff refused to hire at its Canal Street Store a proportion of negro and white clerks approximating the negro and white customers at such stores.

(5) p. 34. Tr. Counter Affidavit of John Hughes, petitioner herein: "Your affiant, and those with him request that the increase in the proportion of negro to white clerks take place as white clerks quit their employ or are transferred by plaintiff, and again at p. 36, tr: "That the words on the placards were to the effect that plaintiff refused to hire at its store a proportion of Negro and white clerks approximating the number of white and negro customers at such store."

Memo. p. 13): ". . . . petitioners were not combating discrimination . . . is acting with sound public policy. In other words, if the purpose of the picketing in this case were to combat discrimination against negroes as such, this purpose is 'legal' ". (Pet. Supp. Memo. p. 15) "The refusal of Lucky Stores, Incorporated, to discuss petitioners request . . . certainly is evidence of discriminatory policy on their part. (Tr. p. 6).

but this contention must be regarded as fully accepted by the decision of the lower Court in this case. That Court must be assumed to have found that there was no discrimination.

Wherefore, Respondent prays for an order that this case be heard and determined by this Supreme Court, believing that a re-examination of the record made by this Court after hearing, will result in a revision and reversal of said District Court's decision herein.

Martinez, California, December 30, 1947.

Respectfully submitted, Superior Court of the State of California, in and for the County of Contra Costa, by Francis W. Collins, District Attorney of the County of Contra Costa, State of California. Lucky Stores, Incorporated, Real Party in Interest, by Hoey and Hoey, its Attorneys.

[fol. 114]

Appendix

In District Court of Appeal of California

[Civ. No. 13535. First Dist., Div. One. Nov. 20, 1947]

John Hughes, et al., Petitioners,

v.

Superior Court of Contra Costa County, Respondent

1. Contempt—Certiorari. Certiorari is the appropriate method to test the jurisdiction of the superior court where

the validity of a contempt adjudication is challenged on constitutional grounds.

2. Certiorari—Hearing—Review as Confined to Record. —The province of the writ of certiorari is to review the record of an inferior court and to determine from that record alone whether such court has exceeded its jurisdiction; evidence outside that record is not permitted.

3. Id.—Hearing—Review as Confined to Record.—In the consideration of the questions raised by issuance of a writ of certiorari, the reviewing court is limited to the factual record presented to the trial court and cannot entertain affidavits that seek to present factual issues not there presented.

4. Interference—With Contract Relations.—While under certain circumstances a deliberate and intentional interference with an existing contract may be tortious and actionable, such interference may, in a proper case, be justified and privileged.

5. Labor—Picketing.—The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contract between employer and employee or employer and customer.

[fol. 115] 6. Interference—With Contract Relations.—The economic interest of negroes in securing employment for members of their race, and in attempting to alleviate the results of a discriminatory labor policy, are of sufficient social importance to justify interference with a collective bargaining contract between an employer and a union.

7. Labor—Picketing.—Where the picketers have a direct economic interest to protect, and such protection is in accord with public policy, they may lawfully picket, regardless of existence or nonexistence of a labor dispute.

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2 See 4 Cal. Jur. 1107; 10 Am. Jur. 544.

McK. Dig. References: 1 Contempt, § 77; 2 Certiorari, § 76; 3 Certiorari, § 77; 4, 6 Interference, § 1; 5, 7-11 Labor, § 23.

7 See 7 Cal. Jur. 10-Yr. Supp. (1945 Rev.) 476; 31 Am. Jur. 948.

8. Id.—Picketing.—It is in accord with sound public policy to permit negroes to picket in an attempt to secure equality in employment practices from employers who cater to negro patronage.

9. Id.—Picketing.—The right to picket is not limited to labor disputes but may be exercised whenever the economic interests of the picketers is sufficiently important to warrant this interference with the rights of those against whom the picketers are operating.

10. Id.—Picketing.—In the picketing of a food store by negroes to compel "proportional" hiring of negro help therein, and to secure discharge of an objectionable employee, with publicity given only to the demand for "proportional" negro employment, even if picketing to secure discharge of the employee was unlawful it would not justify a total injunction against the lawful as well as the unlawful picketing.

11. Id.—Picketing.—Picketing to secure "proportional" hiring of negroes in a food store that catered to negro patronage, was lawful where a discriminatory labor policy existed as to them.

Proceeding in certiorari to annul an adjudication of contempt. Judgment of contempt annulled.

Esises, Truehaft & Condon for Petitioners.

Hoey & Hoey and Frederick Schoeneman for Respondent.

OPINION

PETERS, P. J.

Petitioners were adjudged guilty of contempt in that, in violation of the terms of a preliminary injunction, they admittedly continued to picket a certain grocery store located in Richmond, California, and operated by Lucky Stores, Incorporated. They seek by this proceeding in certiorari to have this adjudication of contempt annulled, it being their contention that the preliminary injunction upon which the adjudication of contempt depends was [fol. 116] violative of their constitutional rights. [1] Certiorari is the appropriate method to test the jurisdiction of the superior court where the validity of a contempt adjudication is challenged on constitutional grounds. (*Fort-cuburg* v. *Superior Court*, 16 Cal. 2d 405 [106 P. 2d 411]; *Kreling* v. *Superior Court*, 18 Cal. 2d 884 [118 P. 2d 470].)

The main problem presented in this proceeding is whether negroes may be lawfully enjoined from peacefully picketing a retail establishment that caters to negro trade, for the purpose of inducing the operators of that establishment, in the course of personnel changes, to hire negro workers in proportion to negro patronage.

A chronological summary of events as disclosed by the clerk's transcript, filed by way of return, is as follows:

May 20, 1947—Lucky Stores filed in the Superior Court of Contra Costa County a verified complaint for injunction, naming various organizations and individuals as defendants. So far as pertinent here, the complaint alleges that there exists a collective bargaining contract between a designated clerks' union and the plaintiff under which the union is recognized as the sole collective bargaining agent for all employees working for plaintiff; that the contract provides that the plaintiff will only employ members of the union through the union unless the union cannot meet the request of the plaintiff or unless the persons on the unemployed list of the union are not satisfactory to the employer, in which events the plaintiff may employ nonunion employees, who, however, must join the union within a specified time; that the defendants have demanded that plaintiff "agree to hire negro clerks, such hiring to be based upon the proportion of white and negro customers patronizing plaintiff's stores, and that the plaintiff discharge those employees participating in the apprehension and arrest of McKennly Jackson," who had been accused of shoplifting; that these demands were refused by plaintiff; that such demands, if complied with, would violate the contract of plaintiff with the union; that no labor dispute exists between plaintiff and the retail clerks' union; that by reason of the refusal of plaintiff to comply with their demands defendants have picketed plaintiff's store; that unless such picketing is restrained, plaintiff will suffer irreparable injury and be forced to close the store in question; that such picketing for such a purpose is an infringement upon plaintiff's right to do business, and would require plaintiff to violate the union contract above mentioned; that plaintiff has no adequate remedy at law. The [fol. 117] prayer is for a permanent injunction restraining such picketing for such purposes, and for a temporary

restraining order until the hearing. The union agreement is attached as an exhibit to this complaint.

May 26, 1947—John Hughes, one of the petitioners in the present proceeding, filed a counteraffidavit in the injunction proceedings. He therein avers that he is a member and an officer in several of the organizations sought to be enjoined; that he makes the affidavit in both his representative and personal capacities; that on May 17, 1947, he and Louis Richardson, the other petitioner, and others, met with some officials of Lucky Stores; that affiant protested against the actions of certain employees of Lucky Stores in arresting one Jackson, charged with petty theft; that the protest was based on claimed unnecessary force, including the firing of a pistol shot in a crowded area, by one of Lucky's employees, in effecting the arrest; that affiant and the others with him requested the discharge of the employee that fired the shot; that one of the officials of Lucky Stores stated that the employee who fired the shot was no longer working at the store in question; that affiant later learned this representation was false; that affiant and those with him also requested that Lucky Stores, so far as the store here involved is concerned, "hire gradually . . . negro clerks until the proportion of negro clerks to white clerks approximated the proportion of negro and white customers. Your affiant and those with him requested that the increase in the proportion of negro to white clerks take place as white clerks quit their employ or were transferred by plaintiff. Your affiant and those with him explicitly stated that they were not requesting the discharge of any of the present employees of the Canal Store [the store in question], but were requesting only the vacancies be filled with negroes until the approximate proportion was reached"; that about 50 per cent of Lucky's customers at this store are negroes, that Lucky's representatives refused to discuss the proposal and the discussion ended; that affiant and those with him had no knowledge of the union contract mentioned in the complaint; that subsequently the officials of the union in question have informed affiant that such union accepts negroes as members and have no objection to the hiring of negro clerks by Lucky Stores as long as such clerks join the union; that the union in question has negro members presently unemployed, and can supply qualified negro clerks to any em-

ployer requesting such help; that on May 19, 1947, members of several of the organizations sought to be enjoined [fol. 118] picketed the Canal Store and continued to do so until May 21, 1947, when the picketing ceased; that there never were more than six pickets patrolling an area more than 100 feet wide; that the pickets were peaceful and there was no violence; that the employees and customers of Lucky's had free ingress and egress to and from the store without molestation; that the pickets were orderly and made no comments to customers or employees; that the placards carried by the pickets were truthful; that the words on the placards were to the effect that Lucky Stores refused to hire at its Canal Street store a proportion of negro and white clerks approximating the proportion of negro and white customers of the store.

Louis Richardson, the other petitioner herein, filed an affidavit containing essentially the same averments contained in the Hughes affidavit. These affidavits were not controverted by the plaintiff in the trial court.

On this same day—May 26, 1947—a hearing on the order to show cause and temporary restraining order was had. The matter was submitted to the court on the complaint, counteraffidavits, points and authorities, and argument. No affidavits at all were filed by the plaintiff. The court determined that plaintiff was entitled to the preliminary injunction.

June 5, 1947—The trial court made and issued its formal order granting the preliminary injunction. By the terms of that order the various persons and organizations, including petitioners, named in the complaint were enjoined from picketing for the purpose of compelling Lucky Stores to hire a proportional number of negro clerks or discharging those employees participating in the arrest of Jackson, and Lucky Stores was required to post a $1,000 bond, which was done.

June 21, 1947—A citation issued from the trial court to petitioners and others ordering them to show cause on June 23, 1947, why they should not be punished for contempt for violating the injunction. This was duly served on petitioners the day of its issuance.

It was stipulated between the parties that on June 21, 1947, the two petitioners picketed the Canal Street store carrying a placard reading: "Lucky won't hire Negro Clerks in proportion to Negro trade, don't patronize," and

while so picketing, petitioners were served with a citation, it having been agreed that petitioners would waive the affidavit normally required.

[fol. 119] *June 23, 1947*—Petitioners moved the court to vacate the preliminary injunction. This motion was denied. The court then found that the two petitioners wilfully violated the injunction, and adjudged that they should be imprisoned for two days and pay a fine of $20. A 10-day stay of execution was granted. On the same day—June 23, 1947—this petition for certiorari was filed in this court.

After this court had granted the writ, the superior court filed its return and answer in which it is admitted that the picketing was without force or violence. In addition, Lucky Stores, through its attorney, filed what purports to be an answer and return to the writ of certiorari to which are attached certain affidavits. By this pleading and by these affidavits Lucky Stores seeks to present to this court certain facts and factual issues that were not presented to, were not considered by, and were not before the trial court. It is not necessary to summarize these factual matters because they are not properly before this court.

[2] It is elementary law that the province of the writ of certiorari is to review the record of an inferior court and to determine from that record, and from that record alone, whether such court has exceeded its jurisdiction. Evidence *dehors* that record is not permitted. (See discussion and many cases collected 4 Cal. Jur. p. 1107, § 69.) It is true that where certain jurisdictional facts were in fact before the trial court but do not appear in the record, those facts may be shown to the appellate court on the return to the writ. (See discussion 4 Cal. Jur. p. 1110, § 71.) But this is not an exception to the general rule. It is merely permitting a party to show what actually was before the inferior tribunal even though that particular fact does not appear formally in the record. Most of the cases cited by Lucky Stores to substantiate its position that we should consider the questioned affidavits all within the category last mentioned. Such cases do not support the contention that an appellate court on such a writ may consider facts and factual issues not presented to or considered by the trial court.

There are two cases cited by Lucky Stores that do contain language that tends to support its contention that this court may properly consider the affidavits asserting the

existence of facts never presented to the trial court. The first of these is *Wilde* v. *Superior Court*, 53 Cal. App. 2d 168 [127 P. 2d 560], a proceeding in certiorari to review a contempt adjudication for practicing law in violation of a disbarment order. The appellate court did take testi- [fol. 120] mony not considered or presented below, and held that such procedure was proper, citing certain habeas corpus proceedings that were not in fact review proceedings, but, in a real sense, were original proceedings in the appellate court. The Wilde case held, however, that, independent of such new evidence, the record introduced below demonstrated that the trial court had exceeded its jurisdiction. What was said about the taking of factual testimony in the appellate court that was not presented below must be held to have been dicta, and, in view of the many cases announcing the rule stated above, it must be held to have been erroneous dicta. In the other case relied upon—*Triplett* v. *Superior Court*, 57 Cal. App. 2d 536 [135 P. 2d 4]—the appellate court in a certiorari proceeding did receive in evidence and did consider and rely upon an affidavit not presented to the trial court. The authority relied upon for such procedure was the dicta in the Wilde case. These two cases are completely out of line with an otherwise unbroken line of authorities, and, in our opinion, should be disregarded.

[3] We, therefore, hold that we are limited in our consideration of the problems here involved to the factual record presented to the trial court, and may not consider the portions of the return of Lucky Stores and its supporting affidavits seeking to present factual issues and facts not presented to the trial court.

The respondent first seeks to support the adjudication of contempt on the theory that petitioners' conduct tended to induce a breach of contract between Lucky Stores and the retail clerks' union. The verified complaint for an injunction is primarily based on this theory, and this point was fully briefed before the trial court. As will later appear, the trial judge rendered an oral opinion in support of the adjudication of contempt, and he therein justified the order on grounds other than inducement of breach of contract. The reasons why the trial judge did not attempt to base his decision on this ground are quite apparent.

In the first place, there are no facts pleaded that demonstrate that petitioners' actions in picketing to secure the

proportional hiring of negro clerks would necessarily result in a breach of contract between the union and Lucky Stores. The picketing negroes did not demand the discharge of any existing employees, except the employee who had fired the shot in arresting Jackson, and the picketing was not directed at this last-mentioned objective. The demand was that, as white help quit or was transferred, they be replaced with negroes. The evidence shows that the union in willing [fol. 121] to accept negro clerks, and that, in fact, at all times here pertinent, it had qualified negro clerks in the union who were unemployed.

[4] In the second place, and this is a complete answer to this contention, while it is now the law of California that, under certain circumstances, a deliberate and intentional interference with an existing contract is tortious and actionable (*Imperial Ice Co.* v. *Rossier*, 18 Cal. 2d 33 [112 P. 2d 631]), it is clearly the law that such interference may, in a proper case, be justified and therefore privileged. The Rossier case expressly recognizes that justification may exist for such an interference with the contract rights of others. It is there stated (18 Cal. 2d at p. 35): "Such justification exists when a person induces a breach of contract to protect an interest that has greater social value than insuring the stability of the contract. (Rest. Torts, § 767.) Thus, a person is justified in inducing the breach of a contract, the enforcement of which would be injurious to health, safety, or good morals. [Citing two cases and the Restatement of Torts, § 767(d).] [5] The interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer. [Citing many cases.] In numerous other situations justification exists (see Rest. Torts, secs. 766 to 774), depending upon the importance of the interest protected." It should be noted that in the comment on clause (d) of section 767 of the Restatement of Torts, cited *supra*, which is the section that enumerates the interests that create the privilege, it is stated that attempts to prevent racial discrimination come within the privilege. That this is so would seem quite clear. [6] The economic interest of negroes in securing employment for members of their race, and in attempting to alleviate the results of a discriminatory employment policy,

are of sufficient social importance to justify the interference with the type of contract here involved.

This brings us to the main question presented on this appeal, namely, whether negroes lawfully and peacefully may picket for the purpose of inducing the operators of a retail establishment that caters to negro trade, in the course of personnel changes, to hire negro workers in proportion to negro patronage. The trial court has held that such picketing should be enjoined. The court rendered an oral opinion, in which the grounds of the decision are fully set forth. The court first stated that it was convinced [fol. 122] that this state should follow a decision of the trial court in New York—*A. S. Beck Shoe Corp.* v. *Johnson*, 153 Misc. 363 [274 N.Y.S. 946]—holding that the right of picketing is limited to labor disputes in the limited sense of those words, and that picketing for the purpose here involved was not in the furtherance of a labor dispute. The judge in the instant case then stated: "The controversy here is not a labor dispute. The defendants do not constitute a labor union or a labor organization of any kind. I don't think there is any question about that. They do not propose [to be] nor are they all members of any single trade or class of trades. Their demands are not connected with any one industry. The questions about which they are now picketing have no connection with wages, hours of labor, unionization, or betterment of working conditions." As a second ground for the issuance of the injunction the trial court then stated: "It is solely a racial dispute. Assuming that the means were peaceful and were devoid of misrepresentation, disorder and violence, the Court is still of the opinion that the purpose sought does not justify the means used, and that injunctive relief is warranted. The acts of the defendants are irreparably injuring the plaintiff's business. Not only do they tend to keep prospective colored customers out of the stores of the plaintiff but they must necessarily have the effect of keeping out white customers also. The purpose of the defendants in having members of one race discharged in order to employ the members of another race will not justify this direct damage to the plaintiff in the conduct of its business. The acts here shown are also contrary to sound public policy. If they were permitted and if they succeeded in their purpose it would then become equally proper for some organization composed of white persons to picket the premises insisting

that all negro employees be discharged and that white employees be re-employed. If this were permitted there is substantial danger that race riots and race reprisals might result in this and other communities. They would serve as precedent for similar activities in the interests of various racial or religious groups and the effect upon the social well being of communities throughout the state would be far reaching. A balancing of advantages to the defendants as against the disadvantages to this plaintiff and to the social order as a whole clearly points to disapproval of the acts complained of.

"As a matter of principle, based upon a sound public policy, the Court cannot lend its assistance to this movement. It must protect not only this plaintiff but the com- [fol. 123] munity as a whole from the dangers which exist in continued activity along these lines. I should like very much to see this position tested in the Appellate Courts."

This opinion fully states the strongest arguments that can be advanced in support of the view that such picketing should be enjoined. Contained therein is every major argument made by the respondents and the various amici curiae who have filed briefs in support of the trial court. The trial judge is to be commended for thus setting forth in full his reasons for granting the injunction. There can be no doubt at all that the views expressed by the trial judge find direct support in the Beck case, *supra*. That case is a one-man opinion of a trial judge. It is factually on all fours with the present case. There, an association of negroes had made demands on the proprietor of a Harlem shoe store that he hire a percentage of negro clerks. The proprietor refused to accede to these demands and certain negroes began to picket the store. The opinion shows, unlike the present case, that the picketing was accompanied by violence. The court granted the injunction, however, without reference to the fact of violence. In his opinion the judge gave as his reasons exactly the same reasons given by the trial judge in the instant case. (The Beck case has been the subject of much discussion. See 83 Univ. of Pa. L. Rev. 383; 35 Colum. L. Rev. 121; 48 Harv. L. Rev. 691.)

There is at least one case from an appellate court that supports the conclusions of the trial court in the instant case, and that is *Green* v. *Samuelson*, 168 Md. 421 [178 A. 109, 99 A. L. R. 528]. In that case certain individuals and

organizations made demands for the hiring of negroes in certain stores operated by the white plaintiffs in a section of Baltimore where negroes outnumbered whites. When these demands were not met, picketing commenced, and an action was brought to restrain such activities. The trial court enjoined the picketing and the Court of Appeals affirmed that portion of the judgment. The following observations were made by the court:

"The defendants contend that this case is, or is akin to, a labor dispute, because their purpose is to secure employment for members of thier race and thus improve its conditions. . . . Their grievance is that the . . . merchants depend almost wholly on colored patronage for their existence and that these merchants do nothing for them in return. That there is some merit in their complaint cannot be disputed, as the planting of a white store in an exclusively [fol. 124] colored community is an exploitation of the inhabitants for profit, but the defendants cannot right their wrongs by means that are unlawful. . . ." (P. 111 [178A.].)

"The general purpose of colored persons to improve the condition of their race may not be improper, but they must adopt lawful means to accomplish this end, and must not resort to intimidation and threats which may easily lead to breach of the peace and physical violence. . . ." (P. 112 [178 A.].)

"They may, by organization, public meetings, propaganda, and by personal solicitation, persuade white employers to engage colored employees and to induce their people to confine their trade to those who accede to their wishes. . . . The complaint here is not with the thing intended to be done but the means employed to do it. . . ." (P. 112 [178 A.].)

These are the strongest authorities and arguments relied upon by respondents. They are all predicated upon the basic premises that the right of picketing is limited to labor disputes, in the most limited sense of those terms; that picketing to secure the employment of negroes in negro-occupied areas does not involve a labor dispute; that the interests sought to be protected by such picketing are racial and not economic; and that such picketing based on racial considerations is against public policy. In our opinion,

every one of these premises is demonstrably unsound, both on principle and authority.

In the first place, when a group that has been discriminated against in employment in a certain industry band together and try to secure an abandonment of those discriminatory policies and practices, and the employers refuse to abandon such practices, the dispute between the employer and this group in a very real sense is a "labor dispute." The United States Supreme Court has expressly so held in the case of *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 [58 S. Ct. 703, 82 L. Ed. 1012]. That case arose in the District of Columbia. The district court enjoined the petitioners, and the Circuit Court of Appeals affirmed, from picketing a certain store for the purpose of inducing the hiring of negro personnel. The United States Supreme Court reversed. The petitioners in that case were a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational and charitable purposes, and the officers of that corporation. The court stated the problem involved as follows (p. 559): "The case, then, as it stood for judgment, was this: The petitioners requested the respondent to [fol. 125] adopt a policy of employing negro clerks in certain of its stores in the course of personnel changes; the respondent ignored the request and the petitioners caused one person to patrol in front of one of the respondent's stores on one day carrying a placard which said: 'Do Your Part! Buy Where You Can Work! No Negroes Employed Here!' and caused or threatened a similar patrol of two other stores of respondent. The information borne by the placard was true. The patrolling did not coerce or intimidate respondent's customers; did not physically obstruct, interfere with, or harass persons desiring to enter the store, the picket acted in an orderly manner, and his conduct did not cause crowds to gather in front of the store."

The focal point of the case was whether the Norris-LaGuardia Act, prohibiting the use of injunctions in labor disputes, applied so as to make improper the action of the district court in granting the injunction in this case. The court stated (p. 559): "The trial judge was of the view that the laws relating to labor disputes had no application to the case. . . . . The Court of Appeals thought that the dispute was not a labor dispute within the Norris-LaGuardia

Act because it did not involve terms and conditions of employment such as wages, hours, unionization or betterment of working conditions, and that the trial court, therefore, had jurisdiction to issue the injunction. We think the conclusion that the dispute was not a labor dispute within the meaning of the Act, because it did not involve terms and conditions of employment in the sense of wages, hours, unionization or betterment of working conditions is erroneous."

The court had previously pointed out that "The relation of employer and employes does not exist between the respondent and the petitioners or any of them. The petitioners are not engaged in any business competitive with that of respondent, and the officers, members, or representatives of the Alliance are not engaged in the same business or occupation as the respondent or its employes." (P. 555.)

The court then analyzed some of the pertinent provisions of the statute and then stated (p. 561): "The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable [fol. 126] than discrimination against workers on the ground of union affiliations. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."

At page 562 the court said: "It was intended [by the Act] that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment and

peacefully to persuade others to concur in their views respecting an employer's practices." (See, also, *Milk Wagon Drivers' Union* v. *Lake Valley etc. Co.*, 311 U. S. 91 [61 S. Ct. 122, 85 L. Ed. 63].)

It is true, of course, that this case is one interpreting the words "labor dispute" as those terms were used in the statute, but the *rationale* of that opinion supports the conclusion that if it is necessary to find the existence of a "labor dispute" before picketing can be justified, then such terms should be broadly interpreted and, so interpreted, the type of dispute here involved is a "labor dispute." (See Rotwein on Labor Law, p. 80, § 96.)

The public policy of this state, as declared by the courts, is in exact accord with the statutory policy of the Norris-LaGuardia Act as interpreted in the New Negro Alliance case. The courts of this state have unequivocally determined that picketing is justified even though the relationship of employer-employee does not exist and where no dispute at all exists between the employer and employee. Thus, in *McKay* v. *Retail Auto S. L. Union No. 1067*, 16 Cal. 2d 311 [106 P. 2d 373], the sales employees of the Howard Automobile Company had entered into a mutually satisfactory bargaining contract with their employer. The salesmen did not want to join a union, and they were entirely satisfied with the terms of their employment. Nevertheless, the union picketed the plant for the purpose of compelling the employees to join their union, or compelling the employer to discharge the employees. The nonunion employees sought an injunction. It was held that the union had the right [fol. 127] peacefully to picket, that the union had a direct interest in the betterment of labor conditions, and that a dispute between employer and employee was not essential to justify peaceful picketing. At page 324 the Supreme Court, after citing many authorities upholding the right to picket where a bona fide labor dispute exists, stated, in reference to the point under discussion: "The plaintiffs do not challenge the soundness of these principles but urge that they do not apply here because there is no 'strike' and no 'labor dispute.' It is said that the related craft members 'only' ceased working because of the penalty imposed for passing a picket line' placed around the company's premises by the 'irresponsible' Salesmen's Union. Such an interpretation of the facts assumes a lack of solidarity among the affiliated

crafts and an unwillingness on the part of the members to cooperate in the action directed against the employer — an assumption which is negatived by every circumstance in the case. Moreover, as has been pointed out in *C. S. Smith Metropolitan Mkt. Co. v. Lyons* (*post*, p. 389 [196 P. 2d 414]) the term 'labor dispute' is a broad one, and, in the absence of statutory definition, may be properly applied to any controversy 'which is reasonably related to employment and to the purposes of collective bargaining.'" (See, also, *Park & T. I. Corp. v. International etc. of Teamsters*, 27 Cal. 2d 599 [165 P. 2d 891, 162 A. L. R. 1426].)

Thus, if it were necessary to hold that in order to justify peaceful picketing, a "labor dispute" must exist, we would be compelled to hold that the controversy here involved is "reasonably related to employment" and is therefore a "labor dispute" within the broad meaning of those terms. But we do not desire to hold that the right to picket is limited to labor disputes.

In the first place, from a standpoint of principle there can be no such limitation on the right to picket. [7] Whatever the true constitutional basis of the right to picket may be, we are convinced that where the picketers have a direct economic interest to protect, and the protection of such interest is in accord with public policy, they may lawfully picket regardless of the existence or nonexistence of a labor dispute. That negroes have such an economic interest to protect is obvious. That they are an economically discriminated-against group is too clear to require discussion. We are here faced with a situation where the employment policy of Lucky Stores, and of other employers, some of whom appear here as amici curiae, has resulted in discrimination in the hiring of negroes. Not only are they the last to be hired and the first to be fired, but many of the group [fol. 128] can secure employment in only the most menial positions. Thus, white employers, operating in negro districts, economically exploiting this group, making their profits from it, now urge that the negroes should not be permitted to picket for the purpose of securing economic equality and fairness in employment, because, forsooth, such a dispute is not a "labor dispute," but a "racial" dispute. The argument contains its own refutation. Obviously, the negroes have an economic interest to protect every bit as important as that of a union that desires to compel noncon-

seeking employees to join the union or to compel the employer to fire them. That interest is entitled to protection, is in accord with sound public policy, and, in our opinion, justifies that form of self-help known as picketing. The fact, if it be a fact, that such disputes may lead to some violence is no ground to deny the right. While, of course, race conflicts are to be discouraged, so is racial discrimination to be discouraged, and the prevention of the latter is a most important part of our public policy. (*James* v. *Marinship Corp.*, 25 Cal. 2d 721 [155 P. 2d 329, 160 A. L. R. 960]; *Williams* v. *International etc. of Boilermakers*, 27 Cal. 2d 586 [165 P. 2d 903]; *Thompson* v. *Moore Drydock Co.*, 27 Cal. 2d 595 [165 P. 2d 901].) Some violence is a possible concomitant of any attempt to improve by self-help the lot of previously subjected groups, as the turbulence of some labor disputes indicates. If violence occurs, the courts possess full power to enjoin the violence even to the extent of enjoining completely the right to picket. (*Milk Wagon Drivers' Union* v. *Meadowmoor Co.*, 312 U. S. 287 [61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200].) The courts of the various states in general and of this state in particular have been quite liberal in upholding the right of labor to picket. This is so because the courts have believed, and quite properly so, that the raising of the living standards of any large subjugated group that otherwise may become an economic burden on the community as a whole is in accord with sound public policy. Every argument that can and has been made in support of the right of labor to picket can properly be made in support of the right of the negro race to secure economic equality. The essential public policy behind both demands is identical. But, say respondent and the supporting amici curiae, if negroes may picket to secure fair employment practices, then whites may also picket to secure the discharge of negroes, and other racial, religious and minority groups may picket to secure rights claimed by them. Those questions are not now before us. [fol. 429] Those problems can be decided when and if they arise. Each case must be decided upon its own facts. [8] All that we are here holding is that it is in accord with sound public policy to permit negroes, a discriminated-against and subjugated group in our society, to picket to attempt to secure equality in employment practices from those employers who cater to negro patronage. The right is granted

not because the picketers are members of a minority group, but because that minority group is economically discriminated against, and is attempting to rectify that condition. Beyond that we do not have to and do not go in this case. [9] We conclude therefore, that on principle the right to picket is not limited to labor disputes but may be exercised whenever the economic interest of the picketers is sufficiently important to warrant this interference with the rights of those against whom the picketers are operating.

In the second place, the cases clearly demonstrate that the right to picket is not limited to labor disputes. In *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769 [62 S. Ct. 816, 86 L. Ed. 1178], the New York courts had enjoined certain union members from picketing some independent bakery goods peddlers to induce those peddlers not to work seven days a week, and to hire a union man one day a week. The Supreme Court stated (p. 774): "So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes, and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

In the case of *In re Lyons*, 27 Cal. App. 2d 293 [81 P. 2d 190], the members of two unions sought to induce the owners of independent grocery stores not to operate on Sunday, and when this demand was refused, started to picket. The trial court issued a restraining order which Lyons violated, and he was found in contempt. On habeas corpus the appellate court, in speaking of the store owners, stated (p. 294):

"They had no dispute nor difference with organized labor concerning wages, hours or conditions of employment, unionization of employees, employing nonunion labor or any other matter that usually gives rise to labor troubles or [fol. 130] differences. The only controversy was over the closing of their places of business on Sunday. . . .

"This case is simply one in which a group of citizens attempted to force the shopkeepers to close their places of business on Sundays. That the group composed the mem-

bership of two labor unions is unimportant. Union members have no greater right to attempt to force a place of business to close on Sunday than has any other group of citizens and at the same time no less right. We must measure the rights of the respective parties to the Sunday closing controversy by general principles, and insofar as the cases dealing with picketing in labor disputes announce those general principles, they are applicable here."

The court also said (pp. 298-299): "We cannot see how the right to peacefully picket, under the guaranty of free speech, could be confined to cases in which there exists a dispute between an employer and organized labor over hours or conditions of employment, rate of pay, unionization of employees or employment of nonunion men and not extended to a dispute between a businessman and any citizen or group of citizens who may differ with him on a question of business policy. The guaranty of the right of free speech is general and extends to every class or group of citizens. As that guaranty is not confined to labor organizations, decisions in those cases announcing the principles upon which the right rests in the cases involving the ordinary labor dispute are important and controlling here. Because we have a difference of opinion on the question of closing a mercantile establishment on Sunday as the cause of the peaceful picketing, that fact should not make the rules announced in those decisions any less applicable. Citizens have just as much and no less right to differ on the wisdom of Sunday closing as they have to entertain different opinions on conditions of employment or rates of pay. The exact method used in conveying these opinions to the public is unimportant provided they are peacefully and quietly done in an orderly manner and not in violation of the provisions of a statute or an ordinance."

The same rules were announced in *In re Bell*, 37 Cal. App. 2d 582, 585 [100 P. 2d 339], where it was stated: "There is no doubt that peaceable picketing is recognized as lawful under the Fourteenth Amendment to the federal Constitution, and article I, sections 9 and 10 of the California Constitution. [Citing cases.] The right to picket by lawful means is not confined to particular groups or unions, but may be enjoyed by all individuals or classes who desire to [fol. 131] thereby convey to the public their opinions regarding labor controversies or to promote their causes by presenting persuasive facts to other workmen, in a legiti-

mate manner, free from force, violence, intimidation or threats. The constitutional privilege may not be conferred upon one class and denied to others. It is guaranteed to all on the same basis, upon the theory that it is a lawful exercise of the constitutional guaranty of freedom of speech, press and assemblage."

These cases stand unequivocally for the proposition that the right to picket is not and constitutionally cannot be limited to labor unions and to labor disputes. It will be noted that in some of the opinions quoted the right to picket is placed directly and without limitation on the state and federal constitutional guarantees of free speech. We have intentionally refrained from discussing the constitutional source of the right. The Supreme Court of this state and of the United States have both frequently announced that the right to picket finds its protection in, and is measured by, the constitutionally guaranteed right of free speech. (See *McKay* v. *Retail Auto. S. & L. Union No. 1067*, 16 Cal. 2d 311 [106 P. 2d 373]; *In re Blaney*,[1] 30 Cal. 2d [184 P. 2d 892]; *Senn* v. *Tile Layer's Union* 301 U. S. 468 [57 S. Ct. 857, 81 L. Ed. 1229]; *Carlson* v. *State of California*, 310 U. S. 106 [60 S. Ct. 746, 84 L. Ed. 1104]; *Thornhill* v. *State of Alabama*, 310 U. S. 88 [60 S. Ct. 736; 84 L. Ed. 1093]; *A. F. of L.* v. *Swing*, 312 U. S. 321 [61 S. Ct. 568, 85 L. Ed. 855]; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293 [64 S. Ct. 126, 88 L. Ed. 58].) If the extent of the right is measured by this test then all peaceful, nonviolent, truthful picketing would be lawful, where not accompanied by a great and present danger to the public, and the object or purpose of picketing would be a false factor. But the Supreme Court of the United States has also indicated that the right to picket is not as broad as the right of free speech, and has held that considerations of public policy may limit the right—see *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722 [62 S. Ct. 807, 86 L. Ed. 1143]. There are several most interesting articles discussing these and other cases. See Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180; Dodd, *Picketing and Free Speech: a Dissent*, 56 Harv. L. Rev. 513; *Teller, Picketing and Free Speech: a Reply*, 56 Harv. L. Rev. 532.) In many of the state cases the right to picket is not based on such broad grounds. These cases hold that picketing, being a form of self-help and of eco-

[1] Advance Report Citation: 30 A. C. 648.

[fol. 132] nomic coercion, is prima facie a tort but may be justified or privileged if the interest sought to be protected, when weighed against the injury to the employer, from a standpoint of public policy, should be protected. Under this theory the right to picket is measured by the yardstick of social and economic consequences. This is the view adopted by the Restatement of Torts, section 775, et seq. (See, also, 1 Teller on Labor Disputes and Collective Bargaining, chapter eight, p. 319, et seq.; 1947 Cumulative Supplement, p. 69, § 136.) We do not find it necessary to choose between these two concepts. In the present case, even if the most limited concept of the nature of the right to picket, as set forth in the Restatement, be accepted, it must be held that the picketing here involved was lawful. The attempt to secure economic equality has long been recognized as the basis of labor's right to picket. Such a purpose is a lawful one. That is exactly what petitioners are seeking here. Even Mr. Teller, who is the most articulate champion of the limited view of the nature of the right to picket as set forth in the Restatement, has stated: "Aggravating circumstances surrounding the negro's search for work reflect the proximate connection between the negro's demands and the labor contract . . . Insecure, dispossessed, intensely exploited, the American Negro worker clings to the crags of life in the face of overwhelming counter availing forces. Abolition of slavery has not meant emancipation of the negro . . . . Within the framework of the labor contract, therefore, and as limited by the subject matter of employment conditions, race, color and creed ought to be accorded the privilege of picketing upon the reasonable assumption that its benefit to the individuals involved is worth more than its cost to society." (1 Teller, Labor Disputes and Collective Bargaining, § 136, at p. 427.) Mr. Justice Murphy expressed this same thought in his concurring opinion in *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192, at p. 209 [65 S. Ct. 226, 89 L. Ed. 173], in the following language: "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged." In *James* v. *Marinship Corp.*, 25 Cal. 2d 721 [155 P. 2d 329, 160 A. L. R. 909], our State Supreme Court recognized a definite national and state public policy to prevent

unequal treatment of persons because of their color. (See, also, *Williams* v. *International etc. of Boilermakers*, 27 Cal. 2d 586 [165 P. 2d 903]; *Thompson* v. *Moore Drydock Co.*, [fol. 133] 27 Cal. 2d 595 [165 P. 2d 901].) It follows, of course, that when negroes seek to prevent discrimination in employment practices by demanding the hiring of negroes in proportion to negro patronage, such demand does not violate any principle of public policy. To the contrary, if the negro is to rise to a position of economic integrity, that being a desirable public aim, he must be afforded the means by which to achieve such elevation. The right to protest peacefully against those who would deny him economic equality is the most elementary tool with which he should be permitted to commence his ascent. The alternative—the economic shackling of negroes to their present economic status—is far more dangerous to our social development than the imaginary difficulties envisaged by the trial court in this case.

There are several minor points that should be discussed. It will be remembered that, in their original demands, the organizations and individuals enjoined requested not only the gradual hiring of negro clerks in proportion to negro patronage, but also the discharge of a particular worker who had allegedly used undue force in arresting a negro accused of the theft of bacon from the store in question. Picketing for this purpose as well as for the purpose of securing employment for negroes was enjoined. The actual picketing, however, did not publicize this phase of the dispute and did not seek this result. The placards displayed merely referred to the failure of the store proportionally to employ negroes. [10] Even if picketing to secure the discharge of this employee were unlawful (a point we do not decide), this would not justify a total injunction against lawful as well as the assumed unlawful picketing. As was said in *Park & T. I. Corp.* v. *International etc. of Teamsters*, 27 Cal. 2d 599, at page 607 [165 P. 2d 891, 162 A.L.R. 1426]: "Unlawful conduct in connection with concerted activities does not necessarily call for an injunction totally prohibiting the activities. A union may continue its concerted activities if they can be purged of the elements that make them unlawful." Here the two elements are severable. Moreover, the complete answer to this phase of the case is that petitioners were adjudged to be in contempt not because they picketed to secure the discharge of

this employee, but because they carried placards demanding the proportional hiring of negro clerks.

[11] The respondent also urges that even if picketing to secure economic equality were lawful, picketing to secure "proportional" hiring of negroes is unlawful. Such an argument disregards the realities. Carried to its logical con-
[fols. 134-135] clusion it would mean that a store whose patronage is entirely negro, and where many clerks were hired, by the token hiring of one negro, could prevent the picketing of such establishment aimed at preventing such discrimination and exploitation. Even if it be assumed that a demand for a mathematical quota, discrimination being absent, would be an unlawful demand, in the present case it is the fact that discrimination here exists that makes what otherwise, it may be assumed would be unlawful, lawful. Beyond that we need not go.

The judgment of contempt is annulled.

Bray, J., and Finley, J. pro tem., concurred.

[fol. 136] Receipt of a copy of the within Petition for a Hearing by the Supreme Court is hereby admitted this 30th day of December, 1947.

Robert N. Condon, Edises, Treuhaft and Condon, Attorneys for Petitioners.

[fols. 137-139] [File endorsement omitted]

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

[Title omitted]

PETITIONER'S ANSWER TO PETITION FOR HEARING BY THE SUPREME COURT—Filed January 9, 1948

[fol. 140] Questions Presented

1. The main question presented by this case has been framed by the District Court of Appeals as follows: ". . . whether negroes may be lawfully enjoined from peacefully picketing a retail establishment that caters to negro trade, for the purpose of inducing the operators of that establishment in the course of personnel changes, to hire negro

workers in proportion to negro patronage." (82 A. C. A. p. 493. See also p. 498)

2. In its petition for hearing, respondent raises a further question: whether evidence not presented to the trial court may properly be received and considered by The District [fol. 141] Court of Appeal at the time of the hearing on the Writ of Certiorari. It is Petitioners'[1] contention that this is a subsidiary and relatively minor issue of the case.

Statement of the Case

Petitioners object to Respondent's[2] Statement of the Case since it includes, as fact, matters which are not part of the record. All the alleged facts, related in the Petition for Hearing from the beginning of the Statement of the Case on page 2, line 9, to page 3, line 9, are not in the record and are apparently to be gleaned from three affidavits which The District Court of Appeals refused to consider, and which alleged facts were never evidenced before the trial court.

The District Court of Appeals, in its "chronological summary of events" (82 A. C. A. 493-496), has set forth a Statement of the Case with brevity and exceptional clarity to which Petitioners respectfully refer the Court for a full exposition of the facts. Petitioners will briefly set forth the more salient features of The District Court's summary.

On May 20, 1947, Lucky filed a verified complaint with Respondent against various organizations and individuals. The gravamen of the complaint was that the defendants [fol. 142] had demanded that plaintiff Lucky agree to hire Negro clerks in proportion to Negro and white patronage and to discharge certain employees who had arrested one McKennly Jackson, and that defendants had picketed in support of their demands. The complaint contained numerous references to a collective bargaining contract between Lucky and a designated clerks union, and the primary theory of the complaint appears to have been that the defendants were inducing, or attempting to induce, a breach of this

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[1] Hughes and Richardson, petitioners in the District Court of Appeals, will be referred to herein as "Petitioners."

[2] The Superior Court of Contra Costa County will be called "Respondent" herein. Lucky Stores, Incorporated will be referred to as "Lucky."

collective bargaining agreement. There was also an allegation that defendants were infringing on plaintiff's "right to do business" and the customary allegations of irreparable injury and the inadequacy of the legal remedy. No affidavits in support of the complaint were filed. A temporary restraining order and an order to show cause were signed the same day the complaint was filed.

Defendants filed Counter-Affidavits by Hughes and Richardson,[3] both plaintiff and defendants filed points and authorities, and on May 26, 1947, oral argument was had before Honorable Hugh H. Donovan of Respondent. Respondent granted a preliminary injunction forbidding picketing in support of defendant's demands, the formal order being signed June 5, 1947.

On June 21, 1947, a citation was issued to Petitioners, Hughes and Richardson, to show cause why they should not be judged in contempt of the preliminary injunction. It was [fol. 143] stipulated that on this date the two Petitioners had picketed one store of Lucky with placards which read "Lucky won't hire Negro Clerks in proportion to Negro trade—Don't Patronize."

On June 23, 1947, the petitioners were adjudged in contempt of the preliminary injunction and each was sentenced to be imprisoned for two days *and* to pay a fine of $20.00.[4] A ten day stay of execution was granted. The same day, a petition for certiorari was filed in the District Court of Appeal.

On July 1, 1947, the District Court of Appeal granted the writ. Respondent made its return and in addition Lucky filed a purported answer and return, to which were attached certain affidavits, raising some factual matters which had never been presented to the trial court.

On November 20, 1947, by a unanimous decision, The District Court of Appeal, with the opinion written by Presiding Justice Peters, annulled the judgment of contempt. The Court decided the main question, as quoted above, as well

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[3] A summary of the Counter-Affidavits appears in the Decision below, 82 A. C. A., 494-495, and will not be repeated here.

[4] Petitioners received both fine and imprisonment, not in the alternative, as stated in Respondent's Petition for Hearing (p. 9).

as all the subsidiary issues, in favor of Petitioners.[5] It [fol. 144] should be noted that at all times it has been conceded that the picketing herein was peaceful and orderly. In addition it seems clear that the placards carried by Petitioners were truthful and without misrepresentation.

In the discussion that follows, Petitioners will deal first with the question concerning the affidavits and then with the main issue.

I

The Affidavits, Attached to the Return and Answer of Lucky Stores, Incorporated, Alleging Factual Matters Not Before the Trial Court, Were Properly Excluded by the District Court of Appeal.

In the words of Justice Peters in the decision below (82 A. C. A. 496),

> "It is elementary law that the province of the writ of certiorari is to *review the record* of an inferior court and to determine from that record, and from that record alone, whether such court has exceeded its jurisdiction. Evidence *dehors* that record is not permitted." (emphasis added)

Jurisdictional facts that are before an inferior tribunal, but which do not formally appear in the record, may be shown on the return, but not new matters.

In the instant case, Lucky without any showing of surprise or that the matters were newly discovered—indeed such showing would be impossible—is attempting by affidavits in an appellate court, to show certain new facts and

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[5] In addition to its decision on the main issues the Court held: 1) That certiorari was an appropriate remedy; 2) That Affidavits attached to Lucky's return and answer should not be considered by the Court; 3) That the injunction and contempt order could not be supported on the theory of inducement of breach of contract; 4) that it was unnecessary to decide the legality of the demands and original picketing relating to the discharge of certain of Lucky's personnel who had arrested Jackson, since the picketing found contumacious did not seek this result. Respondent apparently has abandoned its original inducement of breach of contract theory, since it does not raise it in its Petition for Hearing.

to raise new factual issues, never considered by the trial [fol. 145] court. Although Respondent cites other authority,[6] the only cases seemingly in support of its position are *Wilde v. Superior Court*, 53 Cal. App. (2d) 168 and *Triplett v. Superior Court*, 57 Cal. App. (2d) 536. As was pointed out by Justice Peters, however, in the *Wilde* case, the actual decision *was* based upon the record below, and the statements relating to factual testimony in an appellate court were merely dicta. The *Triplett* case relied entirely upon the *Wilde* dicta. Moreover, in the *Triplett* case, both parties presented affidavits to the appellate court and objection to the consideration of new matters was first made in a petition for rehearing. In effect, therefore, the objecting party in the *Triplett* case invited the error and hence could scarcely complain of it. (See 57 Cal. App. (2d) at page 540) Thus analyzed, there does not appear to be the divergence in decision claimed by Respondent.

A better answer to Respondent's contentions on this question, however, is that the issue is not controlling. In its Statement of the Case in its Petition here, Respondent has drawn freely upon the rejected affidavits. The only fact alleged by the affidavits and set forth in its Statement [fol. 146] of the Case here, which appears at all relevant is the allegation that Lucky had hired since 1946 two Negro clerks. Apparently, it is Respondent's contention that this proves that Lucky did not discriminate against Negroes, and therefore it contends that Lucky was entitled to the preliminary injunction that Respondent issued.

Assuming, *arguendo*, that Lucky had in fact hired two Negro clerks, this is surely not adequate proof of a non-discriminatory policy. Before any such inference could be drawn, other facts would be needed. How many white clerks in addition to the two Negroes does Lucky employ at its many stores? How many Negroes have applied for jobs?

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[6] Respondent cites *Blair v. Hamilton*, 32 Cal. 50, *Los Angeles v. Young*, 118 Cal. 295 and *In re Madera Irrigation District*, 92 Cal. 296. The first two cases are illustrations of the general rule that all the facts before the inferior tribunal may be considered by the reviewing court even though not technically or formally part of the record. The *Madera* case is not a case of certiorari or other extraordinary writ and does not seem in point.

How many vacancies have been filled with white persons during the time the two Negroes were hired? What instructions, if any, has Lucky given the clerks union or to its personnel department, relating to the color of prospective employees? These questions should be answered, before the conclusion could follow that the "token" hiring of two Negroes establishes a non-discriminatory policy on the part of Lucky.

It is submitted therefore that even if the affidavits were considered non-discrimination would not be shown. If this be so, obviously, the main issue would be decided in exactly the same way. It seems, therefore, unnecessary to take the time of this Court on the grounds of asserted lack of uniformity of decision to have a hearing on a prodecural point which would not require a reversal even if the District [fol. 147] Court of Appeals had decided it erroneously.

II

Negroes May Not Be Lawfully Enjoined from Peacefully Picketing a Retail Establishment That Caters to Negro Trade for the Purpose of Inducing the Operators of That Establishment, in the Course of Personnel Changes to Hire Negro Workers in Proportion to Negro Patronage.

The carefully reasoned opinion by Presiding Justice Peters in the District Court of Appeal on the main issue makes supererogatory any extended discussion by Petitioners. While important, particularly to the Negro people of California, the principles involved in this case are not novel and the law applied by the District Court of Appeal is well established. *New Negro Alliance v. Sanitary Grocery*, 303 U. S. 552, a case with almost identical facts, establishes the principle that Negroes, as a group consistently discriminated against, have a right to publicize by picketing their demands for increased employment. While technically the case involved the construction of the Federal anti-injunction Statute, the public policy of California relating to picketing is in exact accord with the Norris-LaGuardia Act, despite the fact that California has no such statute. *McKay v. Retail Auto S. L. Union No. 1067*, 16 Cal. (2d) 311; *Park & Tilford etc. Corp. v. Int'l etc. Teamsters*, 27 Cal. (2d) 599. Accordingly, it would seem that the doctrine of the *New Negro Alliance* case should control. [fol. 148] The main authority upon which Respondent re-

lies is an inferior court decision in New York, *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N. Y. S. 946. The *Beck* case, decided in 1934 before the constitutional nature of peaceful picketing was ever alluded to, was urged by the grocery in the *New Negro Alliance* case and its reasoning was rejected by the United States Supreme Court. Moreover, the *Beck* case, although not cited, was in effect overruled by *Lifshitz v. Straughn*, 261 App. Div. 737, 27 N. Y. S. (2d) 193, and it can no longer be considered the law of New York.

Petitioners find surprising, to say the least, Respondent's reliance on *James v. Marinship*, 25 Cal. (2d) 721; *Williams v. Boilermakers*, 25 Cal. (2d) 586 and *Thompson v. Moore Dry Dock Co.*, 27 Cal. (2d) 595 as authority for their position. According to Respondent, these landmark cases, which so materially advanced the struggle of the Negro for full and fair employment in basic industry, which imposed the responsibility upon organized labor to give equality of treatment to Negro workers, are to shackle Negroes seeking employment, and the advancement of their economic interest in the retail grocery trade. It would be an unrealistic distortion, it is submitted to adopt Respondent's position. When the time comes that employers hire Negroes and discriminate against whites, then Respondent's argument might be worthy of consideration. Such is not the case here.

Respondent's whole case, apparently, rests upon its contention that Lucky has a non-discriminatory employment [fol. 149] policy. As pointed out, this contention is unsupported by the record and is not demonstrated even if the rejected affidavits are considered. Assuming, however, that Lucky's employment policy was free from racial discrimination, the injunction was still improperly granted. It cannot be denied that Negroes, as a group, have far more limited employment possibilities than whites. Negroes traditionally are the last to be hired and the first to be discharged. Many industries are closed to them entirely.[7]

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[7] For illustrations of cases involving actual or threatened economic discrimination against Negroes, see *Tunstall v. Brotherhood of L. F. R. E.*, 323 U. S. 210; *Alston v. School Board of Norfolk*, 112 F. (2d) 992, cert. den. 311 U. S. 693; *Chaires v. Atlanta*, 164 Ga. 755, 139 S. E. 559; cf. *Yick Wo v. Hopkins*, 118 U. S. 356.

They have therefore a definite economic interest in securing additional employment for themselves. With such economic interest, their right to picket peaceably, to disseminate at the site of the controversy truthful information to the public about their aspirations, is firmly bedded in the constitution. *Park & Tilford etc., Corp. v. Int'l etc. Teamsters, supra; In re Blaney*, 30 A. C. 648. Discrimination, or lack of it, does not limit this right. For example, in the *McKay* case, the union demanded that the employer hire only union men, an obvious discrimination against the non-union workers. The right to picket was not thereby lost to the union, despite its discriminatory demand. The same is equally true in this case.

The opinion below is well reasoned, in conformity with the [fol. 150] law as enunciated by this Court and the United States Supreme Court, and Petitioners respectfully contend that the decision of the District Court of Appeal should stand, and that a reexamination by this Court is unnecessary.

Respectfully submitted, Edises, Treuhaft & Condon, by Robert L. Condon.

Oakland, California, January 9, 1948.

[fol. 151] [File endorsement omitted]

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IN THE SUPREME COURT OF CALIFORNIA IN BANK

No. S. F. 17685

JOHN HUGHES and LOUIS RICHARDSON, Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA, Respondent

OPINION—Filed November 1, 1948

Petitioners through certiorari seek annulment of a judgment of the superior court of Contra Costa County by which petitioners were found guilty of contempt of court for wilfully violating a preliminary injunction. The injunction

restrained petitioners and certain other individuals, as well as five named unincorporated associations, "from picketing or taking position in front of any of the places of business of Lucky Stores, Incorporated, for the purpose of compelling . . . [Lucky Stores, Incorporated, hereinafter termed "Lucky"] to do any of the following acts:

"(1) the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who [fol. 152] patronize . . . [Lucky's] stores." *

We have concluded that, upon the principles enunciated in *James* v. *Marinship Corp.* (1944), 25 Cal. 2d 721, 745, and *Park & Tilford I. Corp.* v. *Int. etc. of Teamsters* (1946) 27 Cal. 2d 599, 607, 614, the injunction properly restrained picketing for the purpose described, and that the judgment of contempt should be affirmed.

The controlling issue is whether the sole objective involved—the discriminatory hiring of a fixed proportion of Negro employes regardless of all other considerations—is lawful. Relative to this issue it is to be particularly noted that here the only activity enjoined is "picketing . . . for the purpose of compelling . . . [Lucky] to . . . [engage in] the selective hiring of negro clerks . . . based on the proportion of white and negro customers who patronize . . . [Lucky's] stores." This is in contrast to the situation which was presented in *Park & Tilford I. Corp.* v. *Int. etc. of Teamsters* (1946), *supra*, 27 Cal. 2d 599, wherein [fol. 153] the injunction which had been issued broadly forbade "concerted activities" for any purpose. As stated in that case (p. 614 of 27 Cal. 2d), "Since defendants, in connection with their concerted activities made unlawful demands that plaintiff sign a closed shop contract and coerce its employees to join defendant unions, it was permissible for the trial court to enjoin defendants from making such

* The injunction also restrained picketing for the purpose of compelling Lucky to discharge certain employes who had participated in the apprehension of a man accused of theft from one of Lucky's stores located in the City of Richmond. However, at the oral argument before this court counsel for the respective parties agreed that the issue concerning the discharge of such employes had been dropped from the case. We therefore treat the injunction as being directed solely against "selective" or "proportional" hiring.

demands," but (p. 607 of 27 Cal. 2d), "The injunction . . . was not limited to enjoining such demands but prohibited defendant's concerted activities and thus prevented defendants from exercising their right under the law of this state and of the federal government to engage in such activities for a closed shop." It is also to be borne in mind that the proceeding before us is not an appeal from the order granting an injunction but is a petition for certiorari to annul a contempt adjudication.

Petitioners allege that on June 21, 1947, approximately three weeks after the injunction issued, they picketed in front of Lucky's Canal Store, "which store is located in the City of Richmond, County of Contra Costa, State of California, bearing placards which carried the following legend: 'Lucky Wont Hire Negro Clerks in Proportion to Negro Trade—Dont Patronize' "; that on the same day they were served with a citation to appear before the superior court on June 23, 1947, and show cause why they should not be adjudged in contempt; that on June 23 they were found guilty of "contempt of the aforesaid preliminary injunction" and received sentence. Petitioners allege further [fol. 154] that both on June 21, 1947, and prior to issuance of the injunction petitioners and the other defendants named in the injunction proceedings "were picketing to secure a change of employment policy and working condition of Lucky . . . by seeking to have Lucky . . . hire at its Canal Store . . . a number of Negro clerks proportionate to the number of Negro customers of said Canal Store . . . A demand for these changes in employment policy was made by your petitioners upon Lucky . . . before any picketing was done at the said Canal Store, which demand related to future vacancies and did not . . . contemplate the discharge of any of the present personnel of said Canal Store." Each petitioner alleges that he is a member and officer of one of the associations named as defendants in the injunction and that each of such associations has a "substantial number of Negroes as members, in the City of Richmond." It is also alleged that petitioners "individually, and as officers" of the associations "have an interest in promoting the employment by Lucky . . . of Negro personnel and in improving the employment possibilities of Negro citizens, particularly of those Negro citizens who are members of the defendant organizations.

"D. The picketing conducted by your petitioners in their individual and representative capacities, and by the defendants . . . [named in the injunction] was designed to promote and foster the aforesaid interest in increasing the [fol. 155] employment possibilities of Negro citizens.

"E. The City of Richmond, County of Contra Costa, State of California, has a large and growing Negro population in excess of ten thousand persons; unemployment among this Negro population is greatly disproportionate to the unemployment among the white persons in Richmond; traditionally, many industries and occupations are closed to Negroes and will remain closed until the Negro people can make effective their demand to obtain equality of opportunity for employment and to prevent economic discrimination against Negroes.

"F. The picketing . . . [at all times] was peaceful and orderly, without force or violence; the pickets did not prevent the customers and employees of Lucky . . . in going to and from the said Canal Store; the picketing was unaccompanied by misrepresentation, threats or intimidation of any sort."

Petitioners urge that the preliminary injunction violated their constitutional right of free speech and was therefore in excess of the court's jurisdiction and void. If their position is sound, a judgment holding them guilty of contempt of the injunction will be annulled upon certiorari. (*Fortenbury* v. *Superior Court* (1940), 16 Cal. 2d 405, 407-409; *Kreling* v. *Superior Court* (1941), 18 Cal. 2d 884.)

After the certiorari petition was filed and the writ issued, respondent superior court and Lucky, the real party in [fol. 156] interest, joined in filing an answer and return. They admit that the picketing by petitioners was without force or violence, but deny that it "was unaccompanied by misrepresentation." They allege that Lucky's "policy throughout has been to hire employees on their individual merit and capacity" and deny that Lucky has discriminated against the Negro race; certain affidavits in support of this allegation and denial are attached to the answer and return.

Respondent and Lucky contend, among other points, that the picketing here involved, and upon which the judgment of contempt is based, was for the attainment of an unlawful

objective, viz: not to induce Lucky not to discriminate against, but, rather, expressly to compel Lucky to discriminate arbitrarily in favor of, one race as against all others in the hiring of a portion of its clerks; and that therefore the injunction was properly issued and the judgment of contempt should stand. With this position, upon the record here, we must agree.

It is now established as the law that "the right to picket peacefully and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech." (*McKay* v. *Retail Auto. S. L. Union No. 1067* (1940), 16 Cal. 2d 311, 319, and cases there cited; see also *Magill Bros.* v. *Bldg. Service etc. Union* (1942), 20 Cal. 2d 500, 511-512; *People* v. *Dail* (1943), 22 Cal. 2d 642, 651; [fol. 157] *In re Blaney* (1947), 30 Cal. 2d 643, 647.) Nevertheless, as emphasized in *James* v. *Marinship Corp.* (1944), *supra*, 25 Cal. 2d 721, 728-729 (see also authorities there cited), the state may protect against abuses of the right; "the object of concerted labor activity must be proper and . . . must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief." (See also *Park & Tilford I. Corp.* v. *Int. etc. of Teamsters* (1946), *supra*, 27 Cal. 2d 599, 603; *N. W. Pac. R. R. Co.* v. *Lumber & S. W. Union* (1948), 31 A. C. 448, 452.)

In the Marinship case the court was concerned with the "fundamental question . . . whether a closed union coupled with a closed shop is a legitimate objective of organized labor." (P. 730 of 25 Cal. 2d.) We held that a union which holds a closed shop contract or other form of labor monopoly must admit Negroes "to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enforcing the closed shop agreement against them." There was not in that case any contention that the *number of Negroes* admitted to membership in the union or hired by the employer must be proportional, regardless of all other considerations, to the number of Negroes residing in the area or doing business with the employer. The judgment awarding a preliminary injunction which "was clearly intended to do no more than eliminate discrimination upon the basis of race and color alone," was affirmed. (P. 745 of 25 Cal. 2d; [fol. 158] see also *Williams* v. *Int. etc. of Boilermakers*

(1946), 27 Cal. 2d 586, 588-593; *Thompson* v. *Moore Dry-dock Co.* (1946), 27 Cal. 2d 595, 597-598.)

It is apparent that the same principles which impelled affirmance of the judgment in Marinship require that the injunction and the contempt order in the case now before us be upheld. The parties in their briefs argue as to whether Lucky does or does not discriminate against Negroes in its employment of clerks, as to whether that matter was considered or determined by the trial court, and as to whether the affidavits treating of that matter and attached to the answer and return are properly before this court. It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective. However, no such broad purpose is shown to have motivated the activities here and the judgment of contempt is not affected by such proposition. Petitioners themselves specifically allege that their activities were "to secure a change of employment policy and working condition of Lucky . . . by seeking to have Lucky . . . hire at its Canal Store . . . a number of Negro clerks proportionate to the number of Negro customers of said Canal Store . . . ."; the injunction which petitioners violated was directed at and limited to the narrow issue of "selective hiring of negro clerks . . . based on the proportion of white and negro customers"; [fol. 159] and the placards carried by petitioners in the course of such violation bore the words: "Lucky Wont Hire Negro Clerks in Proportion to Negro Trade—Dont Patronize." The fact that the hiring by Lucky of a small proportion of Negro employes might tend to show discrimination against Negroes is beside the point; likewise it is immaterial here that Lucky denied any such discrimination. The controlling points are that the injunction is limited to prohibiting picketing for a specific unlawful purpose and that the evidence justified the trial court in finding that such narrow prohibition was deliberately violated.

If Lucky had yielded to the demands of petitioners, its resultant hiring policy would have constituted, as to a proportion of its employes, the equivalent of both a closed shop and a closed union in favor of the Negro race. It would have had no choice but to employ only members of the Negro race in a fixed number of clerical positions, thus effectuating a closed Negro shop as to those positions. Moreover,

because race and color are inherent qualities which no degree of striving or of other qualifications for a particular job could meet, those persons who are born with such qualities constitute, among themselves, a closed union which others cannot join. It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the Marinship case, *supra*, (25 Cal. 2d 721, 737, 745). The fact [fol. 160] that those seeking such discrimination do not demand that it be practiced as to all employes of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object.

There has been some suggestion that the case of *New Negro Alliance* v. *Sanitary Grocery Co.* (1937), 303 U. S. 552, is in some way in point in this litigation, and isolated excerpts of the language in that opinion have been quoted to us. But there is no serious contention that the Norris-La Guardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, 73, U. S. C. Tit. 29) operates in this case to divest the state courts of jurisdiction in the premises and, in the New Negro Alliance case, the only "matter in controversy," as expressed by the court, was (p. 554 of 303 U. S.) "Whether the case made by the pleadings involves or grows out of a labor dispute within the meaning of section 13 of the Norris-La Guardia Act" and, consequently, whether the [fol. 161] United States District Court, by sections 4 and 7 of the Act, was deprived of jurisdiction to issue an order in the premises. The question involved in the cited case is not one which we reach, and as that case contains neither a discussion of any of the considerations which impel our decision nor of any controlling constitutional principle, it provides no precedent of value in resolving any issue now before us.

Petitioners assert that in *Park & Tilford I. Corp.* v. *Int. etc. of Teamsters* (1946), *supra*, 27 Cal. 2d 599, 607, we "held

that peaceful picketing could not be enjoined regardless of the object of such picketing." No such sweeping license was announced in that case. The judgment there enjoined defendants from, among other activities, "any and all picketing or boycotting of plaintiff or of plaintiff's business, products or merchandise." (P. 603 of 27 Cal. 2d.) We held, as previously shown, that at least one of the purposes of defendants in picketing was unlawful and that the judgment should be modified by limiting the injunction to the enjoining of defendants from continuing their activities in connection with that purpose; defendants' activities in connection with lawful demands and purposes were freed from the injunction. By contrast, the injunction in the case now before us is limited to enjoining picketing for a specifically [fol. 162] designated unlawful purpose, viz: discrimination in favor of persons of the Negro race, based on race alone, and hence, arbitrary. Such injunction appears to have been properly issued, and the judgment of contempt based thereon will be affirmed.

Lucky contends, further, that the picketing here in issue was not "a lawful exercise of the right" and not within the constitutional guarantee of free speech, because the defendants had "no relation to the labor contract," the picketing was not directed at working conditions, and the dispute "is solely racial." Lucky also urges that acceding to petitioners' demands for proportional hiring would necessarily result in breach of its collective bargaining contract with the Retail Clerks Union. However, by reason of the conclusion we have reached as to the unlawfulness of petitioners' objective in their activities, and in view of the narrow limit of the injunction which issued and was violated, we do not reach these or other contentions of the parties.

The judgment of contempt is affirmed.

Schauer, J.

We concur: Shenk, J., Edmonds, J., Spence, J.

[fol. 163] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

DISSENTING OPINION

I dissent.

As the majority make no attempt to state the facts with particularity, it seems advisable to do so here. The controversy centered around a grocery store in Richmond, Contra Costa County, one of a chain operated by Lucky Stores, Incorporated. Petitioners were adjudged guilty of contempt in that, in violation of the terms of a preliminary injunction, they admittedly continued to picket the store in question. They seek by this proceeding in certiorari to have the adjudication of contempt annulled, charging that their constitutional rights have been violated. This Court has held that certiorari is the appropriate method to test the jurisdiction of the superior court where it is challenged on constitutional grounds. (Fortenbury v. Superior Court, 16 Cal. 2d 405; Kreling v. Superior Court, 18 Cal. 2d 884.)

Lucky Stores sought an injunction in the Superior Court of Contra Costa County, naming petitioners and various organizations and individuals as defendants. In its verified complaint it alleged that it was a party to a collective bargaining contract with a certain clerk's union wherein it had agreed to employ only members of the union unless the union could not meet its demands, or unless the unemployed members of the union were not satisfactory to it, in which event it might employ non-union members, but [fol. 164] that such non-union employees must then join the union within a specified time. It was further alleged that these petitioners and other defendants demanded that Lucky Stores agree to hire Negro clerks in such proportion as the Negro customers bore to the white customers who patronized the store, and that plaintiff (Lucky Stores) discharge those employees who had participated in the apprehension and arrest of one Jackson who had been accused of shoplifting. Lucky Stores alleged that these demands were refused because to comply with them would violate the contract existing between it and the union, and that no labor dispute exists between it and the union, and that as a result of its refusal to comply, the petitioners and other defendants have picketed its store. It is contended that

this picketing will cause irreparable injury, that it is an infringement on plaintiff's right to do business, and would require it to violate its contract with the union.

In response to the order to show cause why a preliminary injunction should not issue, petitioner Hughes filed a counter-affidavit in the injunction proceeding in which he sets forth the following facts: That he is a member and an officer in several of the organizations sought to be enjoined, and that he makes the affidavit in both his personal and representative capacities; that he and the other petitioner, Richardson, met with some officials of Lucky Stores and protested the treatment accorded Jackson; that he re-
[fol. 165] quested Lucky Stores, so far as this particular store is concerned, to hire gradually Negro clerks until the proportion of Negro to white clerks approximated the proportion of Negro to white customers. This proportional hiring was to take place as the white clerks left the employ of the store in question, or were transferred by plaintiff to other stores owned and operated by it. It was specifically stated that petitioner did not request the discharge of any employees of the store, but only that vacancies be filled with Negroes until the approximate proportion was reached. It was further alleged that about 50 per cent of the customers at this particular store were Negroes. At this time, petitioner had no knowledge of the contract existing between Lucky Stores and the union, but that subsequently the officials of the union informed petitioner that the union accepted Negro members, and that it had such qualified members presently unemployed, and could supply Negro clerks to any employer requesting such help. Petitioner states further that on May 19, 1947, members of several of the organizations sought to be enjoined, picketed the store in question. This picketing was confined to not more than six pickets patrolling an area more than 100 feet wide; that the pickets were peaceful and there was no violence, no comments were made to customers or employees, other than the placards which were carried by the pickets. The words on the placards were to the effect that Lucky Stores refused to hire, at this particular store, a proportionate number of Negro clerks.

[fol. 166] The affidavit of Richardson, the other petitioner, was to the same effect, and contained substantially the same statements. Neither of these affidavits were controverted by the plaintiff in the trial court.

The trial court granted a preliminary injunction in favor of the plaintiff. Petitioners violated the terms of the injunction by picketing the store in question and were adjudged guilty of contempt of court.

It was agreed, at the oral argument before this Court, by counsel for the respective parties, that the issue concerning Jackson had been dropped from the case. The sole question involved at the present time, therefore, is the right of petitioners to picket a retail store, thereby setting forth their grievances and demands and publicizing the same.

When the writ of certiorari issued, respondent superior court and Lucky Stores, as real party in interest, joined in filing an answer and return, alleging that the picketing was without force and violence, but denying that it was not accompanied by misrepresentation, and alleging that the policy of Lucky Stores was to hire its employees on their individual merit and capacity, and denying that there had been any racial discrimination. It was contended that the picketing here involved was for the attainment of an unlawful objective.

It is a well-established principle that the Fourteenth Amendment to the Federal Constitution invalidates legis- [Fol. 167] lation that infringes substantive rights of a fundamental character. The decision of the Supreme Court of the United States in Cantwell v. Connecticut, 310 U. S. 296, made it clear that a judicial decision in the field of substantive law might also be found to be a violation of due process. Bridges v. State of California, 314 U. S. 252, was the first case to decide that punishment for contempt may violate the guaranty of freedom of speech.

The United States Supreme — has held that picketing is identified with the freedom of speech guaranteed by the First Amendment to the Constitution of the United States. (Bakery Drivers Local v. Wohl, 315 U. S. 769; Milk Wagon Drivers Union, Local 753, v. Meadowmoor Dairies, 312 U. S. 287; Thornhill v. Alabama, 310 U. S. 88; Carlson v. California, 310 U. S. 106.) This Court has also so held in In re Blaney, 30 Cal. 2d 643, Northwestern Pacific Railway Co. v. Lumber & Saw Mill Workers' Union, 31 Cal. 2d 441, Park & T. I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599; McKay v. Retail Auto S. L. Union No. 1067, 16 Cal. 2d 311, Magill Bros. v. Bldg. Service etc. Union, 20 Cal. 2d 596, and others. In so holding, this Court has established as the law of this state that the right to picket peacefully

and truthfully is one of labor's lawful means of advertising its grievances to the public.

It is quite true that the basic reason advanced in support of the fundamental right of freedom of speech for a free people grew out of the need to speak freely concerning [fol. 168] political matters, but it is equally true that there is a need to speak freely with reference to economic matters. This may require a rather delicate balancing of interests involved, in that labor's right to speak freely with regard to its grievances may, in some respects, infringe on the employer's right to conduct his business as he chooses. Labor, always in a less advantageous bargaining position, has been held privileged to picket in an endeavor to put before the public its position, needs, and desires.

It is conceded here that picketing is free speech and something more. It is not an absolute right, but may be said to be in a category by itself, and as such subject to *reasonable* regulation by the courts. The boundaries circumscribing the right to picket are said to be that the *object* of concerted labor activity must be proper and that it must be sought by lawful *means*, or the persons injured by such activity may obtain damages or injunctive relief. There is no dispute here concerning the means used since the picketing was admittedly peaceful. The dispute centers around the objective sought by petitioners.

The picket seeks, through economic pressure, to induce certain action on the part of another. The activity sought to be induced may be one or more of many things. He may be one of a number of employees seeking better hours, working conditions, better pay for his labor, or he may, [fol. 169] as in the present case, seek employment for himself and members of his race. It was held by this court in C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389, and in the McKay case, supra, that labor may exert economic pressure upon employers provided that peaceful means are used and the purpose is one reasonably related to labor conditions. Despite the picketing the public might choose to patronize the merchant, but labor must be given some opportunity to put its case before the public, that the public may decide for itself whether or not the worker's position is a just one.

In New Negro Alliance et al. v. Sanitary Grocery Company, Inc., 303 U. S. 552, it was held that petitioners, members of a group organized to obtain advancement for the

benefit of colored persons, were parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act. The facts were substantially the same as are presented here, except for the words on the placards which the Negroes carried. The court stated the case, on page 559, in the following language: "The case, then, as it stood for judgment, was this: The petitioners requested the respondent to adopt a policy of employing negro clerks in certain of its stores in the *course of personnel changes*: the respondent ignored the request and the petitioners caused one person to patrol in front of one of respondent's stores on one day carrying a placard which said: 'Do Your Part! Buy Where You [fol. 170] Can Work! No Negroes Employed Here!' . . ." and said on page 561, "The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation . . ." [Emphasis added.]

The public policy of this state, as declared by the courts, is in exact accord with the statutory policy of the Norris-LaGuardia Act as interpreted in the above case. It has been here determined that picketing is justified even though no dispute exists between employer and employees. (McKay v. Retail etc., supra.) The Smith case, supra, pointed out that the term "labor dispute" is a broad one, and in the absence of statutory definition, may be properly applied to any controversy which is reasonably related to employment and to the purposes of collective bargaining. (Park & T. I. Corp. v. Int. Etc. of Teamsters, supra.)

It is said that petitioners' objective is unlawful for several reasons: (1) That if the demand of the petitioners had been complied with the result would have been, in effect, the equivalent of both a closed shop and a closed union in [fol. 171] favor of the Negro race; and (2) that such a result would have resulted in discrimination in favor of the Negro race; and (3) that petitioners' objective was not a lawful exercise of the right to picket and hence not within

the constitutional guaranty of free speech because petitioners had no relation to the labor contract; that the picketing was not directed at working conditions, but a racial dispute, and that a compliance with the demand would result in a breach of the contract between Lucky Stores and the Retail Clerks Union. The majority thought it unnecessary to discuss the latter point inasmuch as they found petitioners' objective otherwise unlawful.

The majority, in holding that the judgment of contempt should be affirmed, state that the case of James v. Marinship Corp., 25 Cal. 2d 721, is controlling. The facts in the Marinship case are as follows: Marinship, as employer, had a closed shop agreement with a labor union, whereby it agreed to hire only members of a particular union. Plaintiff, a member of the Negro race, was not admitted to full membership in the union, nor were other members of his race, but he, and they, were admitted to separate Negro lodges affiliated with the union. Negroes were forced to pay dues to these lodges in order to obtain work clearances for employment at Marinship. Marinship was under contract with the Federal Government wherein it was provided that it would not discriminate against any worker because of race, [fol. 172] color, creed or national origin. Plaintiffs were willing to become members of the union on equal terms with other members, but the union would not receive them on that basis. These, then, are the facts which led to the basic question there involved: Whether a closed union coupled with a closed shop is a legitimate objective of organized labor. This question was answered in the negative. It was held that the union may not maintain *both* a closed shop and an arbitrarily closed union.

A closed ship is defined as one that employs *only* union members. (Irving v. Joint Dist. Council, U. B. of Carpenters, etc. [N. Y.], 180 Fed. 896, 899; Miners in General Group v. Hix [W. Va.], 17 S. E. 2d 810, 813.) A closed union is one which arbitrarily denies admittance to qualified workers. It was the combination of the two, resulting in discrimination between the races, which brought about the end result—that the discriminated-against race was unable to obtain gainful employment in the closed shop, admittedly a vicious circle, which was forbidden by the decision in the Marinship case. This is the case, which, according to the majority, is supposedly analagous to the result sought to be achieved by petitioners here.

The Retail Clerk's Union, which is involved here only incidentally, is not a closed union. It numbers among its members those of both the white and Negro races. It has also among its members, unemployed qualified Negro clerks. The contract between Lucky Stores and this union was not [fol. 173] a "closed shop" agreement, but in reality, a "union shop" agreement. (Markham-Callow v. International Woodworkers [Ore.], 135 Pac. 2d 727; Miners in General Group v. Hix [W. Va.], 17 S. E. 2d 810.) Lucky Stores agreed to hire union members, or if they could not be supplied, it might hire others, who must then become members of the particular union. Thus far, we have the normal situation involving a union and an employer. But the present case involves a tri-party situation, which the majority insist on considering as the usual one involving a union and an employer. Petitioners are asking that Negro clerks be hired, and they are quite willing, and would consider their demands fully met if the unemployed qualified Negro clerks, presently members of the union involved were hired. The statement in the majority opinion that the right to work for Lucky Stores would be based on race, rather than qualification for the work, is absolutely without foundation. Nothing could be more remote from the truth.

It is true that one must be born into the Negro race in order to qualify for membership within its ranks, but that is also quite true of the Caucasian, Chinese and Japanese races. But the majority have forgot that the State of California is one of the United States of America where "all men are created equal," where all have equal rights, and where it has been repeatedly declared that discrimination shall *not* exist because of race, color or creed.

[fol. 174] The situation presented here does not fall within the rule announced in the Marinship case. It does not fall within the definitions of either a closed shop, or a closed union. It must be remembered that picketing for *either* a closed shop, *or* a closed union is not forbidden by law, but that the combination of the two is considered unlawful. It may be assumed for this purpose, that petitioners are asking that a certain proportion of their race be employed in this particular store and that the "shop" would then be closed as to a certain number of employees, although it is difficult to perceive how "closed" and "*half* closed" may be

defined as meaning the *same* thing. Petitioners are not asking that the union admit only Negro members, nor are they asking that it admit any Negro members. The Retail Clerks Union which is involved is an open one. This point is ignored, and the majority assume that petitioners are members of the Negro "union", that, of necessity, it is a closed "union", and for Lucky Stores to meet petitioners' demand would result in a closed shop and a closed union, an unlawful result. As a necessary analogy then, we have every shop employing only white help operating a "closed" shop with the aid of a "closed union", since only white persons may belong to the white "union", and we have, as a result, many flagrant violations of the Marinship rule. This absurd situation follows from considering that a *race* of people constitute a "union".

The majority opinion states: "If petitioners were upheld [fol. 175] in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis." Petitioners are seeking non-discrimination, not discrimination. Discrimination is treatment which is not equal. It follows that non-discrimination must be equal treatment. Petitioners are seeking just that, and nothing more. It has long been established in Equity, that the court will look through form to substance. It has also been said often and emphatically that in Equity each case must be decided on its own facts, hence it might logically follow that in a neighborhood predominately Chinese or Japanese, or on an Indian reservation that picketing for a proportional hiring of members of the particular race involved would be just, equitable and entirely in accord with sound public policy. It is not involved here. But involved here is a store situated in a district where the population is composed of a large majority of members of the Negro race. These members of the Negro race comprise at least fifty percent of the customers of the store in question. The petitioners by means of peaceful picketing and through the words printed on their placards were seeking to publicize their grievance to members of their race, and to members of the white race in sympathy with their long struggle for freedom, so that economic pressure might be exerted to gain for them equality in the labor field. They requested only that a proportionate number of Negro clerks be hired as replace-

ments were necessary. Not that any white person be fired that they might be hired.

[fol. 176] It must be admitted by every thinking person that Negroes are, and have been, constantly discriminated against. They are considered by some people as being fit for only the most menial positions. It was even found necessary for the Legislatures of the various states to pass laws that they might obtain shelter and food on an equal basis with members of the white race. The abolition of slavery did not free the Negro from the chains his color imposes on him. It has been said that Negroes may obtain equal opportunities with others for employment by organization, public meetings, propaganda, and by personal solicitation. The effectiveness of these methods may well be doubted. Labor, as a whole, found that the only way it might attain its objectives of better working conditions, hours and pay was to exert economic pressure on employers. Nothing else was heeded. Is the Negro here to be denied his only effective means of communicating to the public the facts in connection with the discrimination against him, and the only effective method by which he may achieve non-discrimination?

The majority assume, without deciding, that if racial discrimination exists, picketing in protest of it would not be for an unlawful objective. How can it be said that picketing to attain non-discrimination is unlawful? Petitioners are asking *equal* treatment, that which is guaranteed to them by the Constitution of the United States, and yet their objective is called unlawful."

[fol. 177] The end result of the majority decision is to establish a rule which may be applied to prevent picketing for the purpose of publicizing the fact that an employer is discriminating against persons because of race or color in the selection of his employees. Because, if such employer should employ only one of such race or color in some menial position, such as janitor or messenger boy, any claim of discrimination, according to the majority view, would be unjustified, and picketing to prevent discrimination (even though thousands of qualified members of such race or color were refused employment for that reason) would be unlawful, and could be restrained by injunction. This must be the effect of the rule announced in the majority opinion. For if an employer who employs only one

or two of a certain race in 10,000 employees, when hundreds of qualified members of such race are seeking employment, and he can be picketed by the members of such race to induce the employment of an increased number of such members, then, it must follow that such employer may be picketed for the purpose of inducing him to employ a sufficient number of the members of such race to indicate an intention not to discriminate against the members of such race in the selection of his employees. In other words, if the picketing is truthful and peaceful, it may be resorted to as the exercise of the constitutional right of freedom of speech or press, and that is all petitioners did in this case.

It is my opinion, therefore, that the writ should issue [fol. 178] annulling the judgment of contempt rendered against the petitioners.

Carter, J.

[fol. 179] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

DISSENTING OPINION

I dissent.

In my opinion this case was correctly decided by the District Court of Appeal and the judgment of contempt should be annulled for the reasons set forth in the opinion of that court by Presiding Justice Peters. (82 A. C. A. 491, 186 P. 2d 756.) It is here necessary to direct attention only to those considerations that compel me to take issue with the majority opinion of this court.

That opinion holds that the object of the picketing was to limit certain jobs to a closed shop and a closed union and that such an object is unlawful by virtue of James v. Marinship, 25 Cal. 2d 721. In my opinion this holding is based on an erroneous application of that case. The union there had secured through its closed shop contract a monopoly of the jobs in a certain plant, and this court held that a union with such a monopoly cannot close its doors on racial grounds and simultaneously enforce its closed shop contract against those arbitrarily excluded from the union. In the present case petitioners seek, not a monopoly [fol. 180] of the jobs available, but only a share of those

jobs that they believe they would have had if there had been no discrimination against them. The union in the Marinship case was free to open its ranks to all. Here a group helpless to open its ranks to all is seeking a share of the available jobs in proportion to its patronage. Rules developed to curb abuses of those already in control of the labor market have no application to situations where the moving party is seeking to gain a foothold in the struggle for economic equality. Petitioners are seeking by reasonable methods to discourage discrimination against them. It is unrealistic to compare them with those who sought to couple a closed union with a closed shop for the very purpose of discrimination.

Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color, or by demanding a certain number of jobs for members of their group. The majority opinion holds that economic equality cannot be sought by the second method if picketing is adopted as the means of attaining that objective. In the absence of a statute protecting them from discrimination it is not unreasonable for Negroes to seek economic equality by asking those in sympathy with their aims to help them secure jobs that may be opened to them by the enlistment of such aid. In their struggle for equality the only effective [fol. 181] economic weapon Negroes have is the purchasing power they are able to mobilize to induce employers to open jobs to them. (See New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 561; Bakery Drivers' Local v. Wohl, 315 U. S. 769, 775.) There are so few neighborhoods where Negroes can make effective appeals against discrimination that they may reasonably regard the seeking of jobs in neighborhoods where their appeal may be effective the only practical means of combating discrimination against them. In arbitrating the conflicting interests of different groups in society courts should not impose ideal standards on one side when they are powerless to impose similar standards upon the other. Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group's economic power to secure economic equality. (See Mr. Justice Brandeis dissenting in Duplex Co. v. Deering, 254 U. S. 443, 488; C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389, 403.) There is no reality in the

reasoning that those who seek to secure jobs where they have an opportunity to enlist public support on their behalf are thereby seeking illegal discrimination in their favor, for the fact remains that everywhere they turn for jobs they are likely to encounter the barrier of discrimination.

The picketing in this case is directed at persuading Lucky to take action that it may lawfully take on its own initiative. [fol. 182] No law prohibits Lucky from discriminating in favor of or against Negroes. It may legally adopt a policy of proportionate hiring. The picketing confronts Lucky with the choice of adopting a policy that is not illegal in itself or risking the loss of patronage that may result from the picketing. Had California adopted a fair employment practices act that prohibited consideration of the race of applicants for jobs, it might be said that the demand for proportional hiring would be a demand that Lucky violate the law. Neither the Legislature nor the people have adopted such a statute, and I find no implication in the majority opinion that its equivalent exists under the common law of this state.

It is important to note, apart from the lawfulness of the objective, that the picketing in this case has none of the nonspeech characteristics that would justify an injunction. It is established by numerous United States Supreme Court decisions that picketing is protected as an exercise of free speech. (Cafeteria Union, Local 302 v. Angelos, 320 U. S. 293; Bakery Drivers' Local v. Wohl, 315 U. S. 769; Carpenters' Union v. Ritter's Cafe, 315 U. S. 722; A. F. of L. v. Swing, 312 U. S. 321; Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287; Carlson v. California, 310 U. S. 106; Thornhill v. Alabama, 310 U. S. 88; Senn v. Tile Layers' Union, 301 U. S. 468.) As such the states must deal with it as a protected right under the First and Fourteenth [fol. 183] Amendments to the United States Constitution. Within the free speech guaranty, traditional modes of communication are protected unless a clear and present danger of serious substantive evil is shown. (Thomas v. Collins, 323 U. S. 516; Bridges v. California, 314 U. S. 252.) Although picketing has not been so identified with other forms of speech that its permissible limits are governed by the same tests (Carpenters' Union v. Ritter's Cafe, supra, 315 U. S. 722; Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287), a state may not deny it protection

as free speech when the elements that differentiate it from other forms of speech are not present. (See Armstrong, Where Are We Going With Picketing, 36 Cal. L. Rev. 1, 30-40.)

In recognition of the fact that picketing often entails more than speech, the United States Supreme Court has allowed states to place limitations on picketing as they could not on traditional modes of communication. In these decisions the Supreme Court has been concerned in the main with the evils attending certain forms of picketing. Thus violent or untruthful picketing is not protected. (Milk Wagon Drivers' Union v. Meadowmoor Dairies, supra, 312 U. S. 287; see Cafeteria Union, Local 302 v. Angelos, supra, 320 U. S. 293, 295; Magill Bros. v. Building Service Etc. Union, 20 Cal. 2d 506.) Again special circumstances may justify a state's limiting the places where and the persons against whom picketing may be carried on. (Carpenters' [fol. 184] Union v. Ritter's Cafe, supra, 315 U. S. 722.) A state may declare, for instance, that the conscription of neutrals, dissociated from the dispute involved, may not be enforced by picketing those neutrals. (Carpenters' Union v. Ritter's Cafe, supra, 315 U. S. 722, 728.) Since picketing is a form of protected free speech, some greater evil or more imminent danger must be found to justify its suppression than would be required to justify curtailment of action protected only by the due process clause independent of the First Amendment. (See Board of Education v. Barnette, 319 U. S. 624, 639.)

A forceful advocate of the view that picketing is not free speech has discussed the nature of picketing as follows: "Picketing is the marching to and fro before given premises with a banner usually containing assertions that the picketed person is 'unfair to organized labor,' or that his employees are on 'strike.' Sometimes the picket speaks these very same words or adds further assertions. This, substantially, is labor's method of stating its side of the controversy. Rarely, if ever, does labor inform the public of all the differences which exist between it and the employer. Nor, indeed, can labor be expected to do so since few will stop to read or listen. Thus the picket appeals basically to sympathy; sometimes, however, he appeals to the customer's sense of embarrassment. Often, too, the picket depends [fol. 185] upon the observance by union members of the rule

—either formally embodied or tacitly understood—forbidding the crossing of picket lines. Another purpose of the picket is to inform those delivering goods to or taking goods from, the picketed establishment that it is on the union's unfair list. In the *Ritter's Cafe* case the cafe employees had no quarrel with Ritter over the terms and conditions of their own employment; they refused, nevertheless, to cross the picket line established by the carpenters' and painters' unions, and furthermore, truckmen refused to make deliveries necessary to Ritter's business." (Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180, 201.) Virtually none of the nonspeech elements of picketing here described are present in this case.

If picketing does not contain substantial nonspeech elements and is primarily conducted to disseminate information, limitations that differentiate picketing from other forms of speech should not be invoked. The picketing here is of this type. The facts of the dispute were fully presented by the banners. Since the picketing was not being carried on by a labor union, no generally observed rules of labor unions against crossing picket lines were brought into play and no deliveries were interferred with. All that was involved in this case was an orderly appeal to the public coupled with a clear and truthful statement of the facts of [fol. 186] the dispute. (See New Negro Alliance v. Sanitary Grocery Co., supra, 303 U. S. 552.) Under such circumstances the unlawful objective doctrine may not be invoked to differentiate picketing from traditional modes of communication. To do so unreasonably interferes with petitioners' right to publicize the facts of their dispute. (See James v. Marinship, supra, 25 Cal. 2d 721, 730; A. F. of L. v. Swing, supra, 312 U. S. 321, 325.)

Traynor, J.

[fol. 187] [File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA IN BANK

[Title omitted]

PETITION FOR REHEARING—Filed November 16, 1948

Come now John Hughes and Louis Richardson, your petitioners, and respectfully petition the Honorable Court

for a rehearing in the above-entitled matter after decision filed November 1, 1948 which affirmed the judgment of contempt against them by respondent Superior Court. The opinion was written by Mr. Justice Schauer, concurred in by Justices Shank, Edmonds and Spence. Justices Carter and Traynor filed dissents.

Your petitioners earnestly contend that petitioners' basic rights of freedom of speech, guaranteed by the First and Fourteenth Amendments to the United States Constitution have been struck down by the majority opinion. Moreover, the thousands of members of racial and religious minorities in the State of California will find that the majority opinion removes from them one needed weapon in their struggle for [fol. 188] economic equality and their realization of the dignity of man. The decision virtually outlaws all picketing by Negroes or other minorities to secure employment in businesses such as the large retail chains, from which they, except in menial capacities, have been systematically excluded. Picketing is the most important weapon working people possess to enlist effectively the support of the general public on their side of a dispute. In effect, the Court, by forbidding picketing, herein, has taken a large step backwards, since its decision will have the inevitable consequence of helping to justify racial discrimination. Industries now closed to minorities can cite the Court's opinion as a justification for remaining closed. Lucky Stores and Safeway, an *amicus* herein, can continue their policy of refusing to hire Negroes except on a token basis. Negroes and other victims of a despicable caste system have been given a blow in their struggle for jobs. We respectfully submit that this Court, which has been outstanding in striking at the hateful system of racial discrimination, must be sympathetic to petitioners' attempt herein to get jobs for Negroes as retail clerks in the City of Richmond. We further submit that the virtually undisputed facts of the case should require a result contrary to that reached by the majority.

In urging reconsideration, we make two principal contentions wherein we believe the majority opinion was incorrect. [fol. 189] First, the objective of the picketing was not discriminatory hiring of Negroes to the disadvantage of whites. Secondly, regardless of whether petitioners were seeking discrimination in favor of Negroes and against whites, they

were picketing for a lawful objective, and, since the means used were peaceful and truthful, the picketing is therefore constitutionally protected.

I

The Objective of the Picketing Was *Not* a Discriminatory Hiring of Negroes to the Disadvantage of Whites.

The majority states "the controlling issue is whether the sole objective involved—the *discriminatory* hiring of a fixed proportion of Negro employees regardless of other considerations—is lawful" (page 2, emphasis added). At the outset, therefore, in poising the problem, the Court assumes that petitioners were seeking to have Lucky Stores *discriminate* in favor of Negroes. Later in its opinion the Court states it agrees with Lucky's position that petitioners were attempting "expressly to compel Lucky to discriminate *arbitrarily* in favor of one race as against all others in the hiring of a portion of its clerks," (page 6, emphasis added). The majority in its analysis of *James v. Marinship*, 25 Cal. (2d) 721, and in its determination that the *James* case controlled, again assumed that petitioners were seeking an "arbitrary discrimination on the basis of race and color."

[fol. 190] Petitioners respectfully submit that there is nothing in the record to justify this assumption. Petitioners were seeking jobs—jobs for people who traditionally are discriminated against. They were seeking jobs in an industry—chain retail food—in which Negroes receive only token employment, if any.

Certainly the Court will agree that a Negro has a right to work in a chain food store if he can get a job. When an organization like the National Association for the Advancement of Colored People, involved in this case, requests a store, such as Lucky, to employ Negro clerks, is it, *per se*, committing an "unlawful" act? Does the Court consider that there is an "unlawful" act when an employer agrees with the NAACP to hire, let us say, *one* Negro—solely because he is a Negro and one of the disproportionate number of Negro unemployed—that is the concern of the NAACP? Or if the Petitioners could "lawfully" request Lucky to hire one Negro clerk solely because he is a Negro and out

of work, is it an "arbitrary discrimination" if they sought jobs for five Negroes or ten Negroes? Is the line between "arbitrary discrimination on the basis of race or color", which the Court says it is striking down in this case, and the undoubted right of Negro organizations to find jobs for their people, so exact and readily ascertainable, that this Court can say it is "arbitrary" and discriminatory" for [fol. 191] people to request a rough equality in the racial composition of the employees of a chain store and the neighborhood it serves? What indeed is "arbitrary" about the request made? If petitioners sought all the jobs at the Canal Store for Negroes, perhaps this might be arbitrary. Is it not reasonable, however, to request employment opportunities based upon the racial composition of the customers? At the Canal Store Lucky profits from the Negro community, since it is undisputed that at least half of its customers are Negro. Are the Negro people being "arbitrary" and discriminating on "the basis of race and color alone" if they ask for the right to be employed where they spend their money?' Certainly, the implication of *New Negro Alliance v. Sanitary Grocery*, 303 U. S. 552, is that this activity is reasonable and indeed desirable. We earnestly submit that the standard of employment sought was in this case reasonable and not arbitrary. It was a practical way of achieving what all decent persons approve, a breakup of the discrimination by employers against Negro unemployed.

Moreover, discrimination cannot be proven by any exact slide rule. Roughly ten per cent of the population of the United States is colored. If there were no discrimination in the employ of Negroes, presumably the Negro population would find employment throughout the entire American [fol. 192] economy in approximately the same ratio; that is, of one Negro in each industry to nine whites. Presumably therefore approximately ten per cent of retail clerks would be colored. Would it not be conceded that if there were no discrimination against *the employment of Negroes*, where the Negro largely lives in segregated areas, there would be a higher percentage of Negro clerks in those stores serving predominantly Negro patronage? Although this may sound speculative, the argument is advanced to show how essentially reasonable petitioners' position has been. Petitioners have sought personnel changes from Lucky to make the actual racial composition of Lucky's employees

conform to the pattern that would undoubtedly exist if the admitted fact of economic discrimination against Negroes disappeared from America. Petitioners have sought to ease in a small way the truly terrible burden the Negro carries. They have been fighting for the victims of discrimination and they are not seeking discrimination against white persons. We submit therefore that they have picketed for a practical and reasonable solution of a difficult problem. They have not sought a "discriminatory hiring of a fixed proportion of Negro employees regardless of all other considerations," as stated by the Court.

II

The Picketing Was for a Lawful Objective Regardless of Whether Its Effect in the Instant Case Involved Dis- [fol. 193] crimination in Favor of Negroes and Against Whites.

It is accepted, we suppose, that the means used herein were lawful, that is, the picketing was truthful and nonviolent. Accordingly, if the objective were lawful, the picketing clearly was constitutionally protected. Particularly is this so, as Justice Traynor points out in his dissent, since there were practically no "non-speech" elements of picketing present in the case.

Even if the majority of the Court is correct in its evaluation that there was demand for a discriminatory hiring on the basis of race or color, we respectfully submit that this does not make the objective of the picketing unlawful. There is no Fair Employment Practices Act in California and it does not violate a statute—no matter how morally or socially wrong it may be—for an employer to discriminate in the hire of employees because of race or color. Accordingly, it seems clear, for example, that Lucky could adopt a policy of hiring *only* Negroes at its Canal Store. Or it could adopt a policy of only hiring Caucasians or Orientals. At least, Lucky could so discriminate without violating any statute.

If Lucky unilaterally could change its employment policy and hire *only* Negroes, why cannot the petitioners request or demand that Lucky employ half Negro and half white [fol. 194] personnel? Why would this demand be "an unlawful objective"? Have petitioners not an interest to protect in view of the existing unemployment of Negroes?

Is not the elimination of the disproportionate Negro unemployment in accord with sound public policy, regardless of its effect on the dominant white groups?

Are petitioners to understand that this Court, under its general equity powers, has incorporated the principle underlying the various Fair Employment Practices Acts, as part of the general law of the State? The Court, in effect, says that petitioners were attempting to discriminate in employment because of race or color and that the picketing was for a "specific unlawful purpose" (page 9, emphasis added). If petitioners cannot seek to impose discriminatory hiring practices, does it not follow that employers, such as Lucky, cannot *maintain* discriminatory hiring practices. If the Court will enjoin petitioners from seeking what it says are discriminatory employment practices, surely it should be prepared to say that it is unlawful for any person, including employers, to discriminate in hiring because of race or color.

If petitioners are correct in their contention that Lucky does discriminate against Negroes, by the logic of the Court's decision, petitioners should be able to secure an injunction against Lucky to prohibit this discrimination. Nor can the Court say it is "unlawful" for Negro people and their organizations to seek discrimination on behalf of Negroes and [fol. 195] that they will be enjoined if they so attempt, unless it is equally prepared to say that it is "unlawful" for employers to discriminate against Negroes and that equitable relief can be obtained against them. We respectfully urge that the Court has the duty to state explicitly the full implications of the decision and that a rehearing should be granted for this purpose.

In conclusion, we respectfully reaffirm the position taken in our brief that we believe it to be an unrealistic distortion to use the *James* case, a judicial landmark in the struggle of Negroes for economic equality, as the authority for a retrogressive decision which will seriously cripple the Negro people and other minorities in their continuing struggle. We respectfully request therefore that a rehearing be granted and that upon reconsideration the decision of the District Court of Appeals be affirmed.

Respectfully submitted, Edises, Treuhaft & Condon,
by Robert L. Condon, Attorneys for Petitioners.

[fol. 196] [File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA

[Title omitted]

ANSWER TO PETITION FOR REHEARING—Filed November 24, 1948

[fol. 197] I. Respondent, Lucky Stores, urges that in no sense can it be said that petitioners sought equality in hiring. Contrary to the statement of their position contained in their petition for rehearing, petitioners did ask this court to sanction discrimination in favor of the Negro race. Their policy and objective throughout was hiring by Lucky Stores based on a fixed proportion—a proportion based solely on color and no other requisite. This policy precluded entirely any hiring by Lucky on a basis of individual capacity and performance. Lucky, in the trial court, the District Court of Appeal and in this Court, recognized the right [fol. 198] of the Negro race to secure jobs for the members of their race, but at the same time has insisted and still maintains that this right when sought to be perfected by the economic device of picketing must be urged in a manner considered lawful by the courts of this state. Demand for hiring solely on the basis of color can only be characterized as a demand for preferential treatment of a particular race. This Court said in *James vs. Marinship*, 25 Cal. (2d) 721 at page 730:

> "Thus a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy, though any such limitations are subject to review by the U. S. Supreme Court, and will be annulled, if they unreasonably interfere with labor's right to publicize the facts of a labor dispute."

2. The demand here made is arbitrary in that to allow the demand and stamp it as "lawful" would mean that hiring instead of being based upon individual merit and capacity must be governed by color alone. Membership in the Negro race as Mr. Justice Schauer pointed out in the

majority opinion would be the sole criterion, and approval by this court of the demand for proportional hiring would mean that a person would belong to both a closed union and closed shop merely because he was born a member of the Negro race. (32 AC 896 at page 901) Again in *James v. Marinship*, 25 Cal. (2d) 721 at page 745, this court said:

> [fol. 199] "; . . . the union may not maintain *both* a closed shop and an arbitrarily closed or partially closed union."

3. It is not reasonable to request employment opportunities based upon a racial composition of the customers, because if race be approved as the only criterion, may it not be asked, why not also logically allow some other formula, for instance, religion, age-group, or education as the basis for a demand "freely spoken" through the medium of the picketing device. Assuming petitioners have not sought discriminatory hiring of a fixed proportion of Negro employees regardless of all other considerations, as they allege in their petition for rehearing, still the end result is exactly that. The demand for proportional hiring must necessarily, if considered lawful, be the forerunner of similar demands by interested "racial" and "pressure groups," demands which do not "touch or concern" the relationship of employer and employee, but merely the interest of an organized racial minority composed of members who are not even employees. In a situation of this type, involving demands of the nature considered here, a preference, a discrimination is created rather than alleviated.

4. A demand which creates and nurtures discrimination based upon race and color and which establishes a preference for a particular race is an unlawful one. Judge Rosenman in *A. S. Beck Shoe Corporation vs. Johnson, et al.*, [fol. 200] 274 N. Y. S. 946 at page 954 said:

> "In the present case no claim is made that any interests of organized labor are involved. It is purely a dispute of one race as opposed to another.
>
> "The acts here shown are also contrary to a sound public policy. If they were permitted and if they succeeded in their purpose, it would then become equally proper for some organization composed of white per-

sons to picket the premises, insisting that all negro employees be discharged and that white employees be re-employed. If they were permitted, there is substantial danger that race riots and race reprisals might result in this and other communities. They would serve as precedent for similar activity in the interest of various racial or religious groups. The effect upon the social well-being of communities throughout the state would be far reaching.

"There is no precedent to warrant the use of this concerted action to the injury of this plaintiff for the purposes indicated. A balancing of advantages to the defendants as against the disadvantages to this plaintiff and to the social order as a whole, clearly points to disapproval of the acts complained of. As a matter of principle, based upon a sound public policy, the court cannot lend its assistance to this movement. It must protect not only this plaintiff but the community as a whole, from the dangers which exist in continued activities along these lines."

5. The hiring of all Negroes or Whites would conceivably be discriminatory, but the record in this case does not reveal such a practice. Contrary to statements in the petition for re-hearing, Lucky does not maintain and the record in this [fol. 201] case does not show that Lucky has practiced a policy of discriminatory hiring. Its policy has followed the consistent pattern of hiring on the basis of individual merit and not because of membership in a special group. Specifically, the record here shows that Lucky hired Negro clerks not in any established proportion to the number of Negro customers patronizing the stores, but on the other hand did hire according to capacity to perform the job assigned to him, in short, upon an individual, rather than a racial basis. Respondent Lucky Stores feels there is no social justification for a policy founded on discrimination in favor of one race against another. Rather than participate in the give and take of the market place, under a rule of equal protection to all races alike, petitioners have continually urged upon Lucky a hiring policy based upon special privilege for a single race.

Clearly, a demand that Lucky discriminate arbitrarily in favor of one race as against all others in the hiring of a

portion of its clerks is unlawful and was properly enjoined in the trial court.

Respectfully submitted, Hoey and Hoey, Attorneys for Respondent and Real Party in Interest, Lucky Stores, Inc.

Dated November 24, 1948.

[fol. 202] [File endorsement omitted]

IN THE SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING REHEARING—Filed November 29, 1948

By the COURT:

Petition for a rehearing is Denied.
Carter, J. and Traynor, J. voting for a rehearing.

Gibson, Chief Justice.

Dated Nov. 29, 1948.

[fol. 203] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 204] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 408, Misc.

On petition for writ of Certiorari to the Supreme Court of the State of California.

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—May 2, 1949

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in*

forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 761.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis, Enter Bertram Edises, Vide 408, Misc. O. T. 1948. File No. 53,763. California, Supreme Court. Term No. 61. John Hughes and Louis Richardson, Petitioners, vs. Superior Court of the State of California in and for the County of Contra Costa. Petition for writ of certiorari and exhibit thereto. Filed February 21, 1949. Term No. 61 O. T. 1949.